Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

60 PP

QUESTIONS PRESENTED

Petitioner was convicted of mail, wire, bank, and tax fraud in violation of 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1). The trial court, over defense counsel's timely objection, removed the element of materiality from the jury for each of the offenses, and the Eleventh Circuit affirmed. This Court affirmed as to the tax counts, and reversed and remanded the case to the Eleventh Circuit on the other counts to determine whether the trial court's error was harmless as to those counts. On remand, petitioner argued, *inter alia*, that evidence that his alleged victims had known his misstatements were false injected enough doubt about the error's effects to require reversal. The court of appeals affirmed, finding, for one count, that although petitioner had presented evidence on which a rational jury could conclude that one of his falsehoods was immaterial, the government could satisfy its burden by showing that other falsehoods covered by the same count were material because the error was subject to harmless-error review and, as to the remaining counts, that petitioner's evidence that his victims knew the falsity of his alleged misstatements was irrelevant to the element of materiality.

The questions presented are:

1. Whether the rule of *Yates* v. *United States*, 354 U.S. 298, 312 (1957)—that when a general jury verdict could rest on any of several theories, and one or more of those theories is legally deficient, the verdict must be overturned—is inapplicable to harmless-error review.

2. Whether, in the case of an allegedly fraudulent transaction, the fact that the victim knew before entering into the transaction that the defendant's statements were false is relevant to the question of whether those false statements were material.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 8

I. THE COURT OF APPEALS' HOLDING THAT *YATES* DOES NOT APPLY TO HARMLESS-ERROR REVIEW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS 8

A. The Court Of Appeals' Failure To Require The Government To Show That The District Court's Instructional Error Was Harmless With Respect To Each Claimed Falsehood Conflicts With Decisions Of Other Courts Of Appeals 9

B. The Court Of Appeals' Exception To The *Yates-Griffin* Rule For Harmless Error Review Cannot Be Reconciled With This Court's Decisions And Has Untenable Consequences 15

II. THE ELEVENTH CIRCUIT'S HOLDING THAT A VICTIM'S KNOWLEDGE OF A STATEMENT'S FALSITY IS IRRELEVANT TO ITS MATERIALITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS 18

A. The Eleventh Circuit's Decision Squarely Contradicts The Decisions Of Other Circuits Regarding The Relevance Of Victim Knowledge To The Materiality Inquiry 19

B. The Eleventh Circuit's Holding That Victim Knowledge Is Irrelevant To Materiality Conflicts With The Decisions Of This Court And Renders This Court's Earlier Ruling In This Case Regarding Materiality A Nullity 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Chapman v. *California*, 386 U.S. 18 (1967) 3, 7

Fedorenko v. *United States*, 449 U.S. 490 (1981) 22

Gart v. *Electroscope, Inc.*, 24 F. Supp. 2d 969 (D. Minn. 1998) 22

Griffin v. *United States*, 502 U.S. 46 (1991) ..... *passim*

Hillson Partners L.P. v. *Adage, Inc.*, 42 F.3d 204 (4th Cir. 1994) 20, 21

In re BankAmerica Corp. Sec. Litig., 78 F. Supp. 2d 976, 990 (E.D. Mo. 1999) 22

In re Convergent Technologies Sec. Litig., 948 F.2d 507 (9th Cir. 1991) 20, 21

In re MobileMedia Sec. Litig., 28 F. Supp. 2d 901 (D.N.J. 1998) 22

Keating v. *United States*, 191 F.3d 1053 (9th Cir. 1999) 12, 14

Kungys v. *United States*, 485 U.S. 759 (1988) ..... *passim*

Mills v. *Maryland*, 486 U.S. 367 (1988) 13

Neder v. *United States*, 119 S. Ct. 344 (1998) 1, 7

Neder v. *United States*, 119 S. Ct. 1827 (1999) .... *passim*

TABLE OF AUTHORITIES — Con't

Page

Parnes v. *Gateway 2000,* 122 F.3d 539 (8th Cir. 1997) 20, 21

Shaw v. *Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996) 20

Tenner v. *Gilmore*, 184 F.3d 608 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 592 (1999) 13, 14

United States v. *Boots*, 80 F.3d 580 (1st Cir. 1996) 12

United States v. *Foley*, 73 F.3d 484 (2d Cir. 1996) 12

United States v. *Fulbright*, 105 F.3d 443 (9th Cir. 1997) 12

United States v. *Gaudin,* 515 U.S. 506 (1995) 3, 18

United States v. *Hastings*, 134 F.3d 235 (4th Cir. 1998), *cert. denied*, 523 U.S. 1143 (1998) 14

United States v. *Holmes*, 93 F.3d 289 (7th Cir. 1996) ... 12

United States v. *Ienco*, 92 F.3d 564 (7th Cir. 1996) .. 12, 14

United States v. *Johnson,* 530 F.2d 52 (5th Cir. 1976) .. 19

United States v. *Johnson,* 139 F.3d 1359 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2365 (1999) 19, 23

United States v. *Neder*, 136 F.3d 1459 (11th Cir. 1998), *aff'd in part and rev'd in part*, 119 S. Ct. 1827 (1999) 6, 7, 10

TABLE OF AUTHORITIES — Con't

Page

United States v. *Palazzolo*, 71 F.3d 1233 (6th Cir. 1995) 12

United States v. *Perkins*, 161 F.3d 66 (D.C. Cir. 1998) .. 15

United States v. *Smith*, 82 F.3d 1564 (10th Cir. 1996) ... 12

United States v. *Wells*, 519 U.S. 482 (1997) 10

United States v. *Whitaker*, 848 F.2d 914 (8th Cir. 1988) 19, 20

Yates v. *United States*, 354 U.S. 298 (1957) ..... *passim*

Zant v. *Stephens*, 462 U.S. 862 (1983) 13

Statutes

8 U.S.C. § 1451(a) 22

18 U.S.C. § 1001 20

18 U.S.C. § 1014 ..... 5, 10

18 U.S.C. § 1341 ..... *passim*

18 U.S.C. § 1343 ..... *passim*

18 U.S.C. § 1344 ..... *passim*

26 U.S.C. § 7206(1) i

28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Ellis E. Neder, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App., *infra*, 1a-23a) is reported at 197 F.3d 1122.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §§ 1341, 1343, and 1344 are reproduced at App., *infra*, 24a-26a.

STATEMENT

Last Term, this Court granted certiorari in this case to resolve two important questions: whether the trial court's removal of an element of a charged offense is subject to harmless-error review, and whether materiality is an element of the federal mail, wire, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344, respectively. *Neder* v. *United States*, 119 S. Ct. 344 (1998). The Court held that removing an element from the jury is subject to harmless-error review and that materiality is an element of the mail, wire, and bank fraud statutes. *Neder* v. *United States*, 119 S. Ct. 1827 (1999). Because the trial court had prevented the jury from considering materiality in petitioner's mail, wire, and bank fraud convictions, the Court remanded the case to the Eleventh Circuit to determine whether the trial court's error in doing so was harmless. *Id.* at 1841. The Eleventh Circuit's application of harmless-error analysis to the trial court's

errors raises several questions, two of which merit this Court's review because the courts of appeals are divided over them and because of the broad ramifications of the Eleventh Circuit's decision for all of federal law.

This case presents the open and frequently recurring question of whether the rule of *Yates* v. *United States*, 354 U.S. 298, 312 (1957)—that when a general jury verdict could rest on any of several theories, and one or more of those theories is legally deficient, the verdict must be overturned—is inapplicable when the underlying legal error is subject to harmless-error review. This case also presents a separate question that has ramifications across many federal laws: whether a victim's knowledge of the falsity of an alleged fraudulent statement is relevant to the question of whether the statement is material. On each of these questions the courts of appeals are deeply divided and in need of review by this Court.

A. On remand from this Court's earlier decision, petitioner argued in the Eleventh Circuit that, because his convictions could have been grounded on any of several theories advanced by the government, and because the jury's verdict was a general one that could have rested on any of those theories, the government had to demonstrate that the trial court's legal error was harmless for *all* of the theories upon which his conviction could have been based. That argument was based on this court's decision in *Yates*, 354 U.S. at 312 ("the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"), and *Griffin* v. *United States*, 502 U.S. 46, 59-60 (1991), in which the Court refined the *Yates* rule by clarifying that it only applied in cases where the deficient ground is "legally inadequate" rather than "factually inadequate." The Court in

Griffin based the difference on the role of the jury; it would be unreasonable to conclude that a jury would base its verdict on a ground that is not supported by the facts if another factually supported ground was presented to them, but there is no reason to believe the jury would choose a legally adequate ground over a legally inadequate one because jurors are not deemed to have expertise in the law. *Id.* at 59.

The court of appeals on remand recognized the *Yates-Griffin* rule, but held that it does not apply when a court is applying the harmless-error test that was laid out by this Court in *Chapman* v. *California*, 386 U.S. 18 (1967). The Eleventh Circuit's holding conflicts with the Fourth, Seventh, Eighth, and Ninth Circuits, all of which apply the *Yates-Griffin* rule to harmless-error cases. See *infra* at 8-17 & cases cited therein. This question has broad implications for the scope of harmless-error review, and this case provides an ideal opportunity to resolve it.

B. Petitioner was convicted of mail, wire, and bank fraud. At petitioner's trial, the trial court expressly removed the element of materiality from the jury's consideration. On remand from this Court's decision, petitioner argued that the trial court's error was harmful because petitioner had challenged the materiality of the alleged misstatements through evidence that his alleged victims were aware of the falsity of the statements in question. According to petitioner, because the lenders were aware of the falsity of petitioner's alleged misstatements, the statements were not material, as required by the federal mail, wire, and bank fraud statutes, §§ 1341, 1343, and 1344 respectively. "[A] false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder* v. *United States*, 119 S. Ct. at 1837 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995)

and *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)) (internal quotation marks omitted). If a decisionmaker enters into a transaction knowing that a statement by the other party to that transaction is false, the false statement is less likely to have "a natural tendency to influence" or be "capable of influencing" the decisionmaker with regard to that transaction.

The court of appeals rejected petitioner's argument, holding that a victim's knowledge of falsity is irrelevant to materiality, and that petitioner's evidence instead went only to whether petitioner's alleged victims relied on those statements,[1] whether he had the requisite intent to defraud, or whether the statements were false. App., *infra*, 15a, 17a-23a. In so ruling, the Eleventh Circuit followed earlier Circuit precedent, as well as decisions from the Fifth and Eighth Circuits. See *infra* 18-22 & cases cited therein. But the Eleventh Circuit's decision conflicts squarely with another decision from the Eighth Circuit and decisions from the First, Fourth, and Ninth Circuits in which courts of appeals have held that knowledge of falsity is relevant to materiality. See *infra* 33-26 & cases cited therein.

The division among the circuits over this question is widespread, and implicates numerous provisions of federal law that contain a materiality requirement. In order to stem the growing confusion, the Court should grant the petition and resolve this important and recurring question.

C. Petitioner was charged with multiple counts of federal tax, mail, wire and bank fraud in connection with a series of land acquisition and development transactions. The indictment alleged that petitioner carried out several different

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[1] Reliance is not an element of the federal mail, wire, and bank fraud statutes. *Neder* v. *United States*, 119 S. Ct. at 1841.

schemes to defraud lenders of funds ostensibly to be used to purchase land and develop condominiums and that he carried out these alleged schemes through a variety of falsehoods. He was also charged with failing to report certain profits from these transactions in his 1985 and 1986 income tax returns. See App., *infra*, 2a-10a; Joint Appendix in *Neder* v. *United States*, No. 97-1985, at 34-143. ("*Neder I* Jt. App.")

The government charged petitioner with fraud in connection with four different types of transactions. The first involved petitioner's acquisition of land to develop condominiums. In connection with these transactions, the government charged petitioner with a variety of falsehoods, including: (i) submission of inflated land appraisals to lenders; (ii) falsely stating that he paid a deposit on the land; (iii) failure to disclose earlier transactions at which the land was purchased at a price lower than its appraised value; (iv) failure to disclose that he had an interest in the corporations from which he was buying the land; and (v) failure to disclose that he received excess loan proceeds from the sales. Petitioner was also charged with, and acquitted of, making false statements to savings institutions, in violation of 18 U.S.C. § 1014. *Neder I* Jt. App. at 42-44, 84-85. The second type of transaction involved the placement of reservations and sales contracts for the condominiums to be built on the land, in which petitioner was charged with falsifying documents. *Id.* at 86-92.

The third type of transaction, charged in Count 77 of the indictment, was an application for a loan from the Central Bank of the South in which the government alleged that petitioner misrepresented that one of the mortgages on the land was held by a trust that petitioner controlled. *Id.* at 13-15. The final set of transactions involved a condominium development called Reddie Point, for which petitioner received a "draw" loan from the United Brotherhood of

Carpenters and Joiners (the "Union"). The loan required petitioner to complete certain work before he could receive, or "draw" funds from a loan account, and the government charged that petitioner falsified documents, including receipts and invoices for work performed and the requests for disbursement themselves. *Id.* at 115-19.

Petitioner contested the government's case on multiple fronts. Petitioner offered evidence to show that he had no intent to defraud, either because he intended to complete every transaction and repay the loans or because he performed the transactions on the advice of counsel, *e.g.*, *United States* v. *Neder*, 136 F.3d 1459, 1461 (11th Cir. 1998). He also offered evidence showing that many of the alleged misstatements were not false. App., *infra*, 15a, 19a, 22a. And as to each of the falsehoods, petitioner also offered evidence that his allegedly false statements were immaterial. For instance, petitioner offered evidence to show that the decisionmakers to which he directed the allegedly false statements either actually knew that the statements were false or had reason to know they were false. *E.g.*, R15 at 45-96; R16 at 43-46; R33 at 27, 35, 37, 51-52, 98, 184-85, 189-90; R36 at 23-24, 40, 80, 118, 122, 130-31, 145-47, 197; R38 at 25, 45.

Nevertheless, at the close of the trial:

> the district court instructed the jury that if it found beyond a reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Neder timely objected to the court's

> findings and its failure to submit the issue of materiality to the jury.

United States v. *Neder*, 136 F.3d at 1461. Petitioner was convicted of nine counts of mail fraud, ten counts of wire fraud, and twelve counts of bank fraud, along with counts for conspiracy, racketeering, making false statements to banks, and tax fraud, and was acquitted of eight counts of making false statements to banks. App., *infra*, 2a. On direct appeal, the Eleventh Circuit affirmed petitioner's convictions on all counts, this Court granted certiorari, 119 S. Ct. 334, and affirmed in part and reversed in part, holding that the trial court erred when it refused to instruct the jury on the element of materiality in petitioner's mail, wire, and bank fraud counts, and remanded the case to the court of appeals for a determination of whether that error was harmless under the standard announced in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). *Neder* v. *United States*, 119 S. Ct. at 1837.

On remand, the Eleventh Circuit affirmed petitioner's mail, wire, and bank fraud convictions, finding the trial court's errors to be harmless. App., *infra*, 2a.

As to one of the land acquisition transactions (Count 32), the court of appeals found that petitioner presented enough evidence so that "a jury rationally could have concluded that [petitioner's] representations . . . were not material," App., *infra*, 17a, thus confirming that the error was harmful under *Chapman*. See *Neder* v. *United States*, 119 S. Ct. 119 S. Ct. at 1839 (The role of the appellate court performing harmless-error analysis is to ask "whether the record contains evidence that could rationally lead to a contrary finding"). Nevertheless, the Eleventh Circuit *affirmed* petitioner's conviction on Count 32 because it alleged several different falsehoods, and, although a reasonable jury could find one of those falsehoods

immaterial, the government had presented sufficient evidence of materiality for some of the *other* falsehoods alleged in Count 32. App., *infra*, 17a-18a.

The court of appeals also held that, although petitioner had presented evidence showing that his alleged victims knew that petitioner's statements were false, that evidence was irrelevant to the issue of materiality. Instead, the court of appeals concluded, that evidence went to whether the alleged victims had relied, whether petitioner had the requisite intent to defraud, and whether his statements were actually false. App., *infra*, 15a-16a, 19a, 21a-22a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDING THAT *YATES* DOES NOT APPLY TO HARMLESS-ERROR REVIEW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In the normal case, when a trial court's error infects some, but not all, theories of conviction submitted to a jury and a reviewing court cannot determine which ground the jury relied upon, the court must reverse the conviction because it has no way of knowing whether the jury relied upon a proper or improper theory. *Yates* v. *United States*, 354 U.S. 298, 312 (1957). The court of appeals below held that this rule does not apply to harmless error review. This ruling conflicts with decisions of other courts of appeals, is inconsistent with this Court's precedents, is perverse in its consequences, and is certain to lead to confusion in applying the harmless-error doctrine.

A. The Court Of Appeals' Failure To Require The Government To Show That The District Court's Instructional Error Was Harmless With Respect To Each Claimed Falsehood Conflicts With Decisions Of Other Courts Of Appeals.

1. When this Court remanded petitioner's case to the court of appeals, it instructed the lower court to "consider in the first instance whether the jury-instruction error" in failing to instruct the jury on the materiality element of mail, wire, and bank fraud "was harmless." *Neder* v. *United States*, 119 S. Ct. 1827, 1841 (1999). Each mail, wire, and bank fraud count in the indictment alleges various falsehoods that petitioner supposedly used as part of a "scheme or artifice to defraud" in violation of those statutes. See *supra* at 4-6. Because there is no way to tell which of those alleged falsehoods the jury relied upon in finding violations of the mail, wire, and bank fraud statutes, petitioner argued on remand that the government was required to show that the district court's failure to instruct the jury on materiality was harmless with respect to *each* alleged falsehood. App., *infra*, 13a-15a.

At trial, petitioner vigorously contested the government's evidence that petitioner possessed the criminal intent to defraud and, in some cases, the government's evidence that his statements were false. See *supra* at 6. It is, therefore, unlikely that the jury found that *every* statement identified in the indictment as having been made in furtherance of a scheme or artifice to defraud was false and made with the intent to defraud. For example, if a count of the indictment alleged that petitioner used false statements A, B, and C in a scheme or artifice to defraud, the jury might have convicted petitioner on the basis of statement A, while finding that statement B was not false and that statement C,

while false, was not made with the requisite criminal intent. The jury-instruction error in this case could not be rendered harmless by overwhelming evidence only that statement C was material, because the jury did not find that petitioner made statement C with the intent necessary for a conviction. There is strong reason to believe, for instance, that the jury did *not* find that appraisals submitted by petitioner —appraisals alleged to be false in the indictment—were false because the jury acquitted petitioner of the charges based on those appraisals under 18 U.S.C. § 1014. App., *infra*, 2a n. 2. See also *United States* v. *Neder*, 136 F.3d 1459, 1461-62 (11th Cir. 1998) (applying the rule of *United States* v. *Wells*, 519 U.S. 482 (1997)). Petitioner argued below that because there is no way to know which statements the jury relied upon in finding petitioner guilty, the government could only show that the district court's failure to instruct the jury on materiality was harmless if it could show that its evidence of materiality of every alleged falsehood was overwhelming. App., *infra*, 11a-14a.

The Eleventh Circuit rejected this argument, holding that "the Government . . . is not required to prove that the evidence overwhelmingly supports the materiality of *every* falsehood alleged," so long as "the evidence of materiality is so overwhelming for enough of the falsehoods charged in a particular count that no rational jury . . . could have acquitted Neder on that count." App., *infra*, 13a. The court of appeals did not, however, require the government to show that the evidence of all of the elements of the mail, wire, and bank fraud—including intent and falsity, as well as materiality—was so overwhelming with respect to some falsehood alleged in each count of the indictment that no jury could have acquitted. Instead, the court of appeals proceeded as if the jury's verdict represented a finding of the other elements of these crimes for every alleged falsehood, so that

if the government's evidence of materiality was overwhelming for *any* falsehood alleged in a count, then the district court's instructional error was necessarily harmless with respect to that count.

Thus, for example, the court of appeals affirmed petitioner's conviction on Count 32 of the indictment, which alleged fraud in connection with a land acquisition loan on the basis of a series of claimed misrepresentations to the lender about the source of petitioner's down payment and various other matters. The government *conceded*, and the court of appeals agreed, that "a jury rationally could have concluded that Neder's representations about the down payment were not material." App., *infra*, 17a. The court of appeals nevertheless affirmed petitioner's conviction on Count 32, relying on the fact that "[i]n Count 32, Neder also was charged with making false representations about his purchase price, control over the nominee corporation, and receipt of the excess loan proceeds." *Ibid.* The court of appeals suggested no reason, however, for thinking that when the jury found petitioner guilty it made any determination that these other alleged misrepresentations, rather than the admittedly contested misrepresentation concerning the down payment, were either false or made with necessary criminal intent. Thus, the court of appeals did not find that there was overwhelming evidence that petitioner committed a crime with regard to *any* of the statements alleged in Count 32.[2]

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[2] Count 32 is not an isolated example. With respect to the counts involving land acquisition loans, the indictment charged petitioner with making five different categories of falsehoods, see *supra* at 5. On remand, the government did not even argue to the court of appeals that its evidence of the materiality of two of those categories was overwhelming. Govt. C.A. Br. 24-25. As to the remaining categories, the government did not argue that the jury actually found either that statements in those categories were false or that petitioner made them with intent to defraud, and because

2. Under analogous circumstances, other courts of appeals have held that an error cannot be deemed harmless when a jury's verdict could have rested on one of several grounds and the government is only able to show that the error is harmless with respect to some of them. In *Keating* v. *Hood*, 191 F.3d 1053, 1062-64 (9th Cir. 1999), for example, the court rejected the argument that an instructional error was harmless when the government could only show that the error was harmless with respect to one of two possible theories that the jury could have relied upon. See also *United States* v. *Ienco*, 92 F.3d 564, 570 (7th Cir. 1996) (rejecting harmless-error argument when one of two alternative theories of conviction submitted to jury was erroneous). The courts of appeals have similarly reversed convictions, without specifically applying the harmless-error standard, when the appellate court determined that an error infects some, but not all, possible bases for a conviction and the court cannot determine which basis the jury relied upon. See, *e.g.*, *United States* v. *Boots*, 80 F.3d 580, 589-90 (1st Cir. 1996); *United States* v. *Foley*, 73 F.3d 484, 493-94 (2d Cir. 1996); *United States* v. *Palazzolo*, 71 F.3d 1233, 1237-38 (6th Cir. 1995); *United States* v. *Holmes*, 93 F.3d 289, 293-96 (7th Cir. 1996); *United States* v. *Fulbright*, 105 F.3d 443, 450-51 (9th Cir. 1997); *United States* v. *Smith*, 82 F.3d 1564, 1567 (10th Cir. 1996).

These courts have rested their decisions on this Court's holding in *Yates* v. *United States*, 354 U.S. 298, 312 (1957), that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." See also

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the verdict was a general one, it is impossible to see how the government could have made such a showing.

Mills v. *Maryland*, 486 U.S. 367, 376 (1988) ("the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict"); *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983) ("a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground").

In *Griffin* v. *United States*, 502 U.S. 46, 59-60 (1991), the Court refined this principle, distinguishing cases where one of several theories of conviction before the jury was "factually inadequate" (*i.e.*, not supported by sufficient evidence to sustain a conviction) from cases where one of several theories before the jury was "legally inadequate" (*i.e.*, contrary to the law). In the former case, a reviewing court must presume that the jury did not rely upon a factually unsupported theory because only an irrational jury would do so. In the absence of evidence to the contrary, juries are presumed to act rationally, so in a conviction that rests on one of two possible theories, only one of which is supported by the facts, the jury is presumed to have relied on the factually supported theory when reaching its verdict, and the conviction should be affirmed. *Ibid.* See also *Tenner* v. *Gilmore*, 184 F.3d 608, 611 (7th Cir.) ("A reviewing court should assume that the jury found that the defendant committed the act that the facts support; anything else would attribute irrationality to the jury"), *cert. denied*, 120 S. Ct. 592 (1999). But in the latter case, reversal is required, because

> [j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to

> law . . . . When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Griffin, 502 U.S. at 59; *Tenner*, 184 F.3d at 611 ("Courts assume that juries can distinguish good proof from bad, but juries do not separate good law from bad. That's the line between *Yates* and *Griffin*").

3. The Eleventh Circuit refused to apply the *Yates-Griffin* line of cases to the process of harmless-error review because "these cases do not involve harmless-error analysis." App., *infra*, 13a n.7. According to the court of appeals, even if the jury could have found that some of petitioner's alleged falsehoods were immaterial, the government had carried its burden and petitioner's conviction should be affirmed so long as "no jury rationally could conclude that his *other* falsehoods were not material." *Ibid.* (emphasis added). The court of appeals thus carved out a novel exception to the rule announced in *Yates* and *Griffin*, holding that this rule does not apply to harmless-error review and that an error can be harmless so long as the government demonstrates that the error did not infect at least *one* possible theory of conviction. This holding is in direct conflict with the Ninth Circuit's decision in *Keating* and the Seventh Circuit's decision in *Ienco*, which applied the *Yates-Griffin* rule to harmless error review, and with the other decisions cited above, all of which presumably would have resulted in affirmances if the government could demonstrate harmless error just by showing that one possible theory of conviction was not infected by the district court's error. See also *United States* v. *Hastings*, 134 F.3d 235, 242 (4th Cir.) (harmless-error review "when the trial court submits a case to the jury on two or more alternate theories, one of which is the subject

of an erroneous instruction" is "guided by" *Yates*), *cert. denied*, 523 U.S. 1143 (1998); *United States* v. *Perkins*, 161 F.3d 66, 74-75 (D.C. Cir. 1998) (applying "*Yates* test" to evaluate harmlessness of instructional error).

The Court should grant the petition to clarify the applicability of the *Yates-Griffin* rule to the harmless-error doctrine.

B. The Court Of Appeals' Exception To The *Yates-Griffin* Rule For Harmless Error Review Cannot Be Reconciled With This Court's Decisions And Has Untenable Consequences.

1. Nothing in this Court's decisions permits a court to disregard the *Yates-Griffin* line of cases in harmless-error review. To the contrary, the context of the role of *Yates* and *Griffin* is never more important than when, as here, a conceded constitutional error taints a criminal defendant's conviction and the government asks a reviewing court to ignore the error as "harmless."

Each count of the indictment in this case presented the jury with various possible grounds for conviction, since the jury could have relied upon any of the falsehoods alleged in each count. Because the district court failed to instruct the jury on materiality, an essential element of mail, wire, and bank fraud, *each* ground submitted to the jury was "legally inadequate" within the meaning of *Griffin*. The jurors manifestly were not equipped to determine, contrary to the court's instructions, that they should not convict petitioner absent a finding of materiality. "[T]here is no reason to think that [the jurors'] own intelligence and expertise will save them" from this sort of error. *Griffin*, 502 U.S. at 59. Just the opposite, there is every reason to think that the jurors followed the district court's erroneous instructions.

The government's assertion that the error in petitioner's trial was harmless does not change the legal (rather than factual) character of the error. If a count of the indictment alleged that petitioner committed mail, wire, or bank fraud by making false statements A, B, and C, and the government shows that its evidence of the materiality of statement C was overwhelming, the government has only shown that the district court's instructional error did not infect one of three possible grounds for conviction. The remaining two possible grounds remain legally inadequate, and the court of appeals had no way of knowing which grounds the jury relied upon. In precisely this situation, where some possible grounds for conviction are legally inadequate and some are not, the logic of *Yates* and *Griffin* requires reversal. It is of no consequence that the court of appeals happened to be engaged in harmless-error review. Indeed, when this Court announced the rule in *Yates*, it was in the context of specifically rejecting the government's argument that the trial court's error in that case was "harmless." *Yates*, 354 U.S. at 311.

2. The extraordinary consequences of the court of appeals' ruling demonstrate the wisdom and importance of the *Yates-Griffin* rule. According to the court of appeals' decision, so long as the government's evidence of the materiality of one of the statements alleged in a count of the indictment was overwhelming, then petitioner's conviction of that count must be affirmed no matter how weak the government's evidence that the particular statement was made with the requisite intent or was even false, and no matter how unlikely it is that the jury's verdict rested on that particular statement rather than the other statements alleged in that count of the indictment.

Still more amazing, the court of appeals' holding means that petitioner is currently imprisoned for committing

mail, wire, and bank fraud, although neither the jury nor any reviewing court has ever made any finding that he actually committed those crimes. The jury's verdict, of course, does not represent a finding of the materiality element of those crimes since the jury was never asked to determine whether any of the alleged falsehoods were material. The court of appeals' truncated version of harmless error review only represents a finding that a rational jury would have had to find *some* of petitioner's alleged falsehoods were material. Of course, for a proper conviction, the *same* alleged falsehood must have been false, material, and made with intend to defraud. In this case, *no* tribunal has ever examined, much less made any determination, whether the same alleged falsehoods were material *and* satisfied the other elements of mail, wire, and bank fraud. Thus, no tribunal has found that petitioner actually committed the crimes for which he is currently imprisoned.

Our system of justice does not permit petitioner to be convicted and jailed without either a jury's finding that he in fact committed a crime or a judicial harmless error determination that, had the jury been properly instructed, it necessarily would have found that he in fact committed a crime. Petitioner objected to the district court's faulty instruction and has acted to protect his rights at every step. Yet, through no fault of his own and with no warning whatsoever, petitioner now finds himself the victim of a procedural trap invented by the court of appeals and by which he remains imprisoned for a crime without the benefit of any proper judicial determination of his guilt. In sum, the Eleventh Circuit's holding is patently erroneous and should be reversed.

II. THE ELEVENTH CIRCUIT'S HOLDING THAT A VICTIM'S KNOWLEDGE OF A STATEMENT'S FALSITY IS IRRELEVANT TO ITS MATERIALITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The court of appeals' decision in this case also raises the fundamental question of whether evidence of knowledge by the victim in a fraud action is relevant to the element of materiality. Materiality is an element of mail, wire, and bank fraud—a rule confirmed by this Court in this very case. *Neder* v. *United States*, 119 S. Ct. 1827, 1841 (1999). In its earlier opinion, this Court explained that "a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 1837 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995), and *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)). One way to prove that a statement does *not* have "a natural tendency to influence . . . the decisionmaking body to which it [is] addressed" is to prove that the decisionmaking body actually knew the statement was false before it entered into the transaction in question. If it was willing to do so regardless of the truth or falsity of the statement, then the statement itself is unlikely to be of the kind that would "influence . . . the decisionmaking body to which it [was] addressed."

The Eleventh Circuit's holding on remand renders this Court's materiality holding a nullity by disregarding the most probative evidence of materiality—that the alleged victim was willing to engage in a transaction even though he knew a particular statement was false—as going to "reliance," App., *infra*, 15a, 19a, to the defendant's intent, *id.* at 21a, or, even more inexplicably, to the statement's *falsity*, *id.* at 16a, 19a, 22a. Instead, the court of appeals held that evidence

showing that petitioner's alleged victims knew that his statements were false "miss[ed] the point of the materiality inquiry." App., *infra*, 19a. That ruling is an affront to this Court's mandate, a worsening of the existing rift among the circuits, and a likely source of even greater confusion over the meaning of materiality in a myriad of federal laws. This case provides an ideal opportunity for the Supreme Court to end this confusion over the meaning of materiality.

A. The Eleventh Circuit's Decision Squarely Contradicts The Decisions Of Other Circuits Regarding The Relevance Of Victim Knowledge To The Materiality Inquiry.

1. The Eleventh Circuit's holding, App., *infra*, 15a, 19a-22a, follows and amplifies similar rulings by the Fifth and Eighth Circuits, and follows earlier Eleventh Circuit precedent, that knowledge of a statement's falsity by the victim of a fraud is irrelevant to whether the statement is material. In the Fifth Circuit, the materiality of a statement "must be judged by the content of the document itself and not by any special knowledge possessed or acquired by the" addressee. *United States* v. *Johnson*, 530 F.2d 52, 55 (5th Cir. 1976). Similarly, the Eighth Circuit has ruled that, in considering materiality, "[i]t is irrelevant what the agent who heard the statement knew at the time the statement was made." *United States* v. *Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988). In line with the Fifth and Eighth circuits, Eleventh Circuit precedent holds that knowledge by the victim "is not a defense to . . . 'materiality,'" *United States* v. *Johnson*, 139 F.3d 1359, 1364 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 2365 (1999).

2. In direct conflict with the court of appeals' holding, the First, Fourth, Eighth and Ninth circuits have,

when considering materiality in the securities law context, for instance, found that evidence that the alleged victim of a fraud knew or had reason to know of the falsity of a particular statement, or the misleading nature of an omission, is probative to establishing that the statement is not material. In *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 513 (9th Cir. 1991), the Ninth Circuit held that an omission about the possibility of decreased sales in an older product was not material because "[a]s a general matter, investors know of the risk of obsolescence posed by older products forced to compete with more advanced rivals." See also *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1206-07 (1st Cir. 1996) (despite the possible negative effects of a particular policy change implemented by a broker, "the investing public had at least a year's worth of hard financial data" with which to assess the impact of the policy, making the change necessarily immaterial); *Hillson Partners L.P.* v. *Adage, Inc.*, 42 F.3d 204, 213-14 (4th Cir. 1994) (an "'on schedule' statement was not material" even after a capital improvement project ran into delays because "[i]t is not a violation of any securities law to fail to disclose a result that is obvious even to a person with only an elementary understanding of the stock market") (internal quotation marks omitted); *Parnes* v. *Gateway 2000*, 122 F.3d 539, 546 (8th Cir. 1997) ("an alleged misrepresentation or omission may . . . be immaterial [because] [s]ome matters are such common knowledge that a reasonable investor can be presumed to understand them").

3. Not only does "material" have a different meaning when applied by different circuits, it currently has a different meaning when applied in different *statutes*. The Eighth Circuit, for instance, applies a different standard for materiality for the purposes of 18 U.S.C. § 1001 than it does for the purposes of the securities laws. In *Whitaker*, 848 F.2d at 916, the Eighth Circuit held, in the context of § 1001, that

"[i]t is irrelevant what the agent who heard the statement knew at the time the statement was made," but the same court held, in the securities context, that a statement or omission can be immaterial if it pertains to a subject that is "such common knowledge that a reasonable investor can be presumed" to know the truth about it. *Parnes*, 122 F.3d at 546. Inconsistency across the circuits in defining a word in a single statute is bad enough, but the existence of different meanings for the same word in different courts and in different statutes creates intolerable uncertainty that must be resolved by this Court.

The prejudice to petitioner resulting from this split of authority is plain. Had petitioner been tried in any of the circuits in which knowledge by the victim is relevant for demonstrating the immateriality of an allegedly fraudulent misstatement, his conviction would have surely been reversed. In *In re Convergent*, 948 F.2d at 513, for example, the Ninth Circuit held that false statements about "information within the public domain" were not material. See also *Hillson Partners*, 42 F.3d at 214 n.8 (Fourth Circuit holding that when information is commonly known and obvious it is "additional evidence of the lack of materiality of the . . . statement[s]"). Petitioner offered evidence about the existence of truthful information within the public domain by presenting testimony, including expert testimony, regarding real estate lending practices in mid-1980s Florida and specifically about how common it was to use nominee corporations in such real estate transactions. See App., *infra*, 15a. Presentation of that evidence alone, and it is only a small portion of the total evidence petitioner presented demonstrating actual knowledge by his alleged victims, would have resulted in a reversal petitioner's conviction in the Fourth or Ninth Circuits, where knowledge of the truth by

a victim of a fraud is relevant to determining the materiality of the falsehood charged.[3]

B. The Eleventh Circuit's Holding That Victim Knowledge Is Irrelevant To Materiality Conflicts With The Decisions Of This Court And Renders This Court's Earlier Ruling In This Case Regarding Materiality A Nullity.

1. The court of appeals reversibly erred in refusing to find evidence of lender knowledge relevant to materiality. Its decision cannot be reconciled with decisions of this Court that the knowledge of the addressee of the misstatements is relevant, if not critical, to determining the materiality of the misstatement. This court's mandate is clear: "for purposes of determining the natural tendency of a misrepresentation to affect a decision . . . what is relevant is what would have ensued from . . . knowledge of the misrepresented fact". *Kungys,* 485 U.S. at 775. See also *Fedorenko* v. *United States*, 449 U.S. 490, 509 (1981) (in the context of 8 U.S.C. § 1451(a)—which requires revocation of United States citizenship "procured by concealment of a material fact"—the court must determine whether "disclosure of the true facts would have made the applicant ineligible" for the document he was seeking). The question asked by the

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[3] See also, *e.g., In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 932 (D.N.J. 1998) ("When assessing materiality . . . not only the statement or omission itself but, as well, the context in which it occurs must be considered"); *Gart* v. *Electroscope, Inc.*, 24 F. Supp. 2d 969, 971 (D. Minn. 1998) (a reason that "an alleged misrepresentation or omission might be immaterial" is that "the matter might be common knowledge that a reasonable investor can be presumed to know or understand"); *In re BankAmerica Corp. Sec. Litig.*, 78 F. Supp. 2d 976, 990 (E.D. Mo. 1999) ("Information of common knowledge, insignificant data, or vague statements are examples of immaterial information").

Kungys definition, "[W]hat would have ensued from . . . knowledge of the misrepresented fact[?]" can be answered by showing that the victim *had* knowledge of the misrepresented fact but was still willing to enter into the allegedly fraudulent transaction; doing so demonstrates what "would have ensued from . . . knowledge of the misrepresented fact."

Moreover, the *Kungys* definition ties the alleged victim's knowledge to the test for determining the misstatement's materiality: a false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision *of the decisionmaking body to which it was addressed.*" *Kungys*, 485 U.S. at 770, quoted in *Neder*, 119 S. Ct. at 1837 (emphasis added). The court of appeals' rule that "actual knowledge 'is not a defense to the "materiality" requirement,'" App., *infra*, 11a (quoting *Johnson*, 139 F.3d at 1364), ignores the last portion of the *Kungys* definition, which directs courts to ask whether the false statement would have a natural tendency to influence the particular decisionmaker to which it is addressed. As *Kungys* explains, the best evidence about the "natural tendency" of a statement directed to a particular decisionmaker is evidence about "what would have ensued from . . . knowledge of the misrepresented fact," *Kungys*, 485 U.S. at 775. Petitioner offered evidence to prove what would have ensued, and what did ensue, when decisionmakers had knowledge of the facts he is alleged to have misrepresented. See *supra* at 6. If a decisionmaker knows a statement is false and is still willing to enter into a particular transaction, this is strong evidence that the misstatement has no "natural tendency" to induce the decisionmaker to enter into that transaction. The court of appeals ignored both the *Kungys* definition, and this Court's mandate in this case, which incorporated the *Kungys* definition, by disregarding petitioner's evidence as relevant only to "reliance," App.,

infra, 15a, 19a, which is not even an element of the federal mail, wire, and bank fraud statutes, intent, *id.* at 21a, which involves not what the decisionmaker knew but what the defendant did, or falsity, *id.* at 15a, 19a-22a, which involves neither the decisionmaker's nor the defendant's knowledge.

Even if the court of appeals is correct that the willingness of an alleged victim of fraud to complete a transaction even with knowledge of the truth underlying the false statement is relevant to whether the victim relied on the misstatement in completing the transaction, there is no rule of law or logic that dictates that evidence can only be relevant for a single purpose. A single piece of alibi evidence, for example, can be used to attack evidence of several elements of a crime, by demonstrating that the defendant committed none of the acts alleged because he was instead in a different place and taking part in a different activity. Just so here. Evidence showing that petitioner's alleged victims knew the truth behind these falsehoods would address reliance if that were an element of the mail, wire, and bank fraud statutes, but it also addresses whether those alleged misstatements were material.

What is more baffling about the court of appeals' decision is that it ascribes some of the evidence petitioner presented to challenge the materiality of his alleged misstatements to challenging the element of *falsity*. App., *infra*, 15a, 19a, 22a.[4] But the truth or falsity of a statement is a purely objective fact; knowledge of the statement's truth or falsity by either defendant or decisionmaker is irrelevant to whether the statement actually was true or false. That the

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[4] The court of appeals also ascribed the defendant's materiality evidence, in one instance, to the element of intent. App., *infra*, 21a.

court of appeals could reach such a misguided and illogical conclusion only underscores the need for reversal.

2. To contest the materiality of the misstatements he was charged with making, petitioner offered a great deal of evidence that his statements were immaterial. On the Reddie Point construction draws, for instance, he offered testimony that he presented false statements in his draw applications *at the instruction of* the alleged victim of his fraud as a way for that alleged "victim," the Union, to compensate petitioner for his willingness to assist the Union in another project. App., *infra*, 21a. For several of the other counts, petitioner presented evidence that he personally informed the lenders of the true nature of the transactions, but that they completed the transactions anyway. App., *infra*, 15a.

What better evidence could petitioner introduce to contest materiality than evidence that his alleged victims *directed* him to make the misstatements or that, even though they knew the truth underlying his misstatements, his lenders were willing to make the loans regardless? Evidence of such awareness on the part of his alleged victims shows that, given the circumstances in which they were said, petitioner's falsehoods did not have a tendency to induce those victims to act because they already knew the truth. But such evidence was rendered meaningless by the Eleventh Circuit's inexplicable decision that knowledge of the truth by the alleged victim of a fraud is irrelevant to determining the materiality of a misstatement. The court of appeals' opinion offers absolutely no explanation of how a false statement made at the behest of the alleged victim of a fraud could "affect a decision" (*Kungys*, 485 U.S. at 775) by that alleged victim, nor can it, because to so conclude defies reason.

The Eleventh Circuit's decision displays a fundamental misunderstanding about the role of victim knowledge of the truth in cases of fraud. Because the court of appeals' decision is so plainly incorrect, and because the underscores the fundamental confusion that exists over the meaning of materiality, this Court should grant the petition for certiorari and reverse the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-2929

D. C. Docket No. 91-175-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELLIS E. NEDER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(December 10, 1999)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before TJOFLAT and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

HULL, Circuit Judge:

This case is before us on remand from the Supreme Court, for us to consider in the first instance whether the district court's failure to instruct the jury on materiality as an element of the federal mail fraud, wire fraud, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344, respectively,

was harmless error.[1] *Neder v. United States*, — U.S. —, 119 S. Ct. 1827, 1841 (1999), *aff'g in part and rev'g in part*, 136 F.3d 1459 (1998). After review, we conclude that the failure to instruct on materiality was harmless error. Accordingly, we affirm Appellant Ellis E. Neder, Jr.'s convictions for mail fraud, wire fraud, and bank fraud.

I. BACKGROUND

Neder, who had been an attorney and real estate developer, was convicted of, *inter alia*, twelve counts of bank fraud (Counts 2-12, 77), nine counts of mail fraud (Counts 21-23, 26-28, 30, 34, 35), and ten counts of wire fraud (Counts 31-33, 78-84).[2] These bank fraud, mail fraud, and wire fraud charges arose from Neder's actions in obtaining land acquisition and development loans between 1984 and 1988. We first set forth the facts pertaining to Neder's land

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[1] In his supplemental briefs on remand, Neder renews his challenge to his convictions on Counts 36 to 72 for making false statements on loan applications in violation of 18 U.S.C. § 1014. Neder concedes that materiality is not an element of § 1014, but argues that the jury's falsity determination for these counts was in error. Neder did not raise this challenge to the jury's falsity determination before the Supreme Court, and the Supreme Court remanded this case for us to consider only the materiality, and not the falsity, of Neder's statements. *See Neder*, — U.S. —, 119 S. Ct. at 1841.

[2] In all, Neder was convicted of seventy-three counts. In addition to the bank fraud, mail fraud, and wire fraud counts, Neder was convicted of one count of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (Count 1); thirty-seven counts of making false statements in connection with loan applications, in violation of 18 U.S.C. § 1014 (Counts 36-72); two counts of tax fraud, in violation of 26 U.S.C. § 7206(1) (Counts 86-87); and two RICO counts under 18 U.S.C. § 1962 (Counts 89-90). Neder was acquitted of eight counts charging overvaluation of land in connection with loan applications, in violation of 18 U.S.C. § 1014 (Counts 13-20).

acquisition loans and development loans and then summarize the procedural history relevant to the issue on remand.

A. Facts

1. Land Acquisition Loans (Counts 2-12, 21-23, 26-28, 30, 31-33)

Neder obtained twelve land acquisition loans, each of which was for an amount greater than the purchase price Neder actually paid for the land involved. For each loan, Neder represented to the lenders that he, through a limited partnership he controlled, had contracted to purchase land from a corporation at a certain price. From the contracts, the sales between the limited partnerships and corporations appeared to be arms' length transactions. The purchase contracts indicated that Neder's limited partnerships had made substantial down payments, totaling more than $3,587,000. Neder also submitted appraisals indicating that the purchase price his limited partnerships had agreed to pay was equal to or less than the fair market value of the land. In each case, the lenders agreed to loan Neder seventy to seventy-five percent of the purchase price which his limited partnership had agreed to pay the seller-corporation.

However, these purchases were actually part of Neder's "land-flip" scheme. Neder controlled both the seller-corporation and the buyer-limited partnership. Neder used his corporations as nominees or intermediaries to buy property from third-party land owners at one price (the "initial price"). His nominee corporation simultaneously resold that same land to his partnership at a substantially higher price (or the "inflated price"). The loan amounts, based on the higher, inflated prices, actually exceeded the total initial prices. Thus, from the loan proceeds, Neder was able to pay the entire initial sales prices to the third-party

sellers and still have a total of over $7 million left over from these loans.

In each "land flip," a check was issued to Neder's corporation for the difference between the amount of the loan to his partnership and the initial price paid to the original, third-party seller. Even though payable to his corporation, Neder endorsed the checks, payable to himself, and deposited them in his personal account. In this way, Neder fraudulently obtained more than $7 million from these loans.[3]

Neder concealed from the lenders that he was taking these loan proceeds. Neder also concealed his interest in the corporations by having someone, such as his friend Horace Marsh, sign documents as the corporation's president. For two loans, Neder also submitted written affidavits falsely stating that he had no relationship to the seller-corporations and that he was not sharing in the profits the corporations would receive from the land sales.

In addition, Neder had not paid the down payments as indicated in the purchase contracts. Neder claimed that he would bring checks for the amount of the down payment to closing, but those checks would not be cashed. The down payment would simply be "netted out" at closing.

The loan officers for these loans all claimed that they would not have made these loans—or, at least, would not have made them on the same terms and conditions—had they known the truth. For instance, the loan officers each indicated that the down payment representations in the land sale contracts were crucial to their lending decisions and that they would not have made loans based on the inflated prices

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[3] Neder paid only $75,000 of the total $17,000,000 in principal he borrowed and eventually defaulted on all of the loans.

in thland sale contracts between Neder's partnerships and corpations if they had known Neder's corporation actually boug the property at a lower initial price.

2. Development Loans

a. Cedar Creek and Southern Grove (Counts 34-35)

Neder also was charged with different types of land devel pment fraud. The first scheme involved his Cedar Creek and Southern Grove projects. In 1985, Neder nego ated a $4,150,000 construction loan from Amerifirst Fede l Savings and Loan ("Amerifirst") to build cond miniums at Cedar Creek and a $5,400,000 construction loan from Security First Federal Savings and Loan ("Sec rity") to build condominiums at Southern Grove. Each lend required Neder to establish the marketability of his deve pment before the lender would approve the loan and relea funds for construction.

For the Cedar Creek loan, this meant Neder was requ d to prove that he had presold twenty condominium units that the presale contracts were "bona fide," and that down payments had been placed in escrow as earnest money for t se contracts. Neder submitted thirteen legitimate contr cts. However, for the last seven required contracts, Nede submitted fraudulent sales contracts. Neder offered to make he $4,000 to $8,900 down payments, if an individual woul simply sign a contract to purchase one of the units. The ntracts did not reveal that Neder furnished the down paym nt, nor did Neder disclose to Amerifirst that he had made hese payments. After obtaining the loans, Neder also had s escrow agent return the deposits he had placed for those seven contracts. Neder ultimately defaulted on this loan. The Amerifirst loan officer testified that if she had know that Neder made those last seven down payments, she

would not have approved the loan or released funds to Neder for construction.

Similarly, before approving Neder's loan and releasing funds, Security required Neder to submit twenty-five reservation agreements, each signed by a prospective buyer of a condominium unit. The prospective buyers were required to pay a $500 deposit into an escrow account. To meet these requirements, Neder again solicited people to sign reservation agreements as prospective buyers, offering to pay the $500 deposits for them. Indeed, Neder paid the $500 deposits on nineteen of the twenty-five reservation agreements he submitted to Security. These reservation agreements did not reveal that Neder, rather than the prospective buyer, had paid the $500 deposit, and again, Neder did not disclose this fact to the lender. Neder also forged the buyers' signatures on two reservation agreements. Neder received funding for the first phase of construction at Southern Grove. However, the loan officer indicated that she would not have approved this loan if she had known about Neder's making the required deposits and forging signatures.

For the next phase of construction at Southern Grove, the lender required Neder to prove that he had presold seventy percent of the units for each building before releasing construction funds for that building. Neder also had to show that the purchasers of those units had made a non-refundable down payment of ten percent of the purchase price and would qualify for a mortgage loan from Security.

To meet these presale requirements, Neder again solicited individuals to sign contracts to purchase condominiums and lend their creditworthiness to support a mortgage. In return, Neder offered to pay the $7,990 to $8,390 required for the ten percent, non-refundable down payment. Neder referred to this arrangement as "equity

sharing." Neder obtained ten signed contracts *in this way*. Again, these contracts did not reveal that Neder furnished the down payments, nor did Neder disclose to Security that he had made the down payments. Indeed, Neder made special arrangements so it would appear that the down payment money actually came from these purchasers. Neder gave each purchaser a check for enough money to open a bank account in his or her name and then obtain a cashier's check from the money in that account to use for the down payment. The cashier's checks were delivered to Neder's escrow agent, who then verified to Security that he had received the down payments and was holding the checks. Neder's escrow agent eventually returned these cashier's checks to Neder. Neder also defaulted on this loan. Security's loan officer testified that if she had known that Neder made these down payments, she would not have approved the release of funds for the second phase of construction.

b. Reddie Point (Counts 78-84)

The second fraudulent scheme involved Neder's false invoices supporting the construction draw requests for his Reddie Point development project. Neder obtained a consolidated, $14 million, acquisition and development loan for this project from the United Brotherhood of Carpenters and Joiners of America (the "Union"). The terms of the loan agreement required Neder to submit draw requests for reimbursement of amounts expended on construction work actually performed at Reddie Point. Advances for future work were not permitted.

From September 1987 through March 1988, Neder submitted seven construction draw requests. Each draw request was based in large part on invoices falsely representing that certain work had been completed at Reddie Point. In reality, Neder had not paid for this work, or the

work was not actually performed at Reddie Point. Furthermore, Neder submitted some invoices with more than one draw request. Based on the draw requests, the Union wired Neder over $5 million. Among other things, Neder used these funds to make loan payments for and pay for the development of his other projects. Of the $5 million Neder received, only about $1,650,000 actually related to work done at Reddie Point. Neder admits that he submitted the false invoices but claims that the Union authorized him to do so. Paul Adler and Stanley Burns, who negotiated with Neder and administered this loan for the Union, denied authorizing Neder to submit false invoices.

c. The View (Count 77)

The last scheme involved Neder's misrepresentations about the amount of debt to be refinanced as part of a $4.7 million development loan he sought from Central Bank of the South ("Central Bank") for a project named "The View." In December 1987, Neder met with Central Bank's loan officer about this loan. The only mortgage on The View property at that time was a $847,500 land acquisition loan from Carteret Federal Savings and Loan.

Subsequently, Neder had his attorney prepare a promissory note and mortgage deed purporting to create a $280,000 second mortgage on The View. On January 21, 1988, Neder signed the deed and promissory note as mortgagor, and the documents were recorded by an attorney from Neder's law firm. This second mortgage was in favor of a trust; however, the person named as the trustee testified that he had never entered a trust agreement with Neder and knew nothing about either the mortgage deed or the $280,000 promissory note.

In February 1988, Neder's application for the $4.7 million loan was approved by Central Bank, which sent a

commitment letter to Neder. In March 1988, Neder signed the commitment letter and returned it, along with a letter conditioning his acceptance on receiving a total of $1,130,000 to pay off the existing $847,500 mortgage, as well as the purported $280,000 mortgage. Central Bank's loan officer agreed to Neder's condition. However, the loan never actually closed. Central Bank required Neder's attorney to sign an opinion letter certifying that there had been no material, adverse change in Neder's financial condition, and Neder's attorney refused to do so. Because Neder took no further steps to close the loan, Central Bank treated the loan application as abandoned.

B. Procedural History

At Neder's trial, the district court decided as a matter of law that the evidence established beyond a reasonable doubt the materiality of Neder's false or fraudulent representations for purposes of the bank, mail, wire, and tax fraud charges. Accordingly, over Neder's objection, the court instructed the jury that it need not consider the element of materiality for these charges.

After he was convicted of these offenses, Neder appealed, arguing, *inter alia*, that the district court erred in refusing to submit the issue of materiality to the jury. In our decision, we affirmed Neder's convictions, concluding that the district court had not erred in failing to submit the issue of materiality to the jury on these counts because materiality is not mentioned in the applicable statutes and thus is not an element under the federal bank fraud, mail fraud, and wire fraud statutes. *United States v. Neder*, 136 F.3d 1459, 1462-64 (11th Cir. 1998). Regarding Neder's tax fraud convictions, we concluded that materiality is an element of the offense, but the district court's failure to submit this issue to the jury was harmless error. *Id.* at 1464-65.

The Supreme Court affirmed this Court's decision in part, holding that the district court's failure to instruct the jury on materiality was harmless error with respect to the tax charges in Counts 86 and 87. *Neder v. United States*, — U.S. —, 119 S. Ct. 1827, 1839 (11th Cir. 1999). However, with respect to the bank fraud, mail fraud, and wire fraud charges, the Supreme Court decided that materiality is an element of those offenses, and the district court's failure to instruct the jury on the element of materiality for purposes of those charges should be reviewed under the harmless-error standard. *Id.* at 1839-41.

The Supreme Court remanded for this Court to consider in the first instance whether the district court's failure to instruct on materiality was harmless error. *Id.* at 1841. To determine whether the removal of an element from the jury's consideration is harmless error, this Court is to consider "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 1839. If it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," then the error is harmless. *Id.* at 1837 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967)).

II. DISCUSSION

As the Supreme Court has instructed, "[i]n general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder*, — U.S. at —, 119 S. Ct. at 1837 (quoting *United States v. Gaudin*, 515 U.S. 506, 509, 115 S. Ct. 2310, 2313 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 1546 (1988))); *see also United States v. Gregg*, 179 F.3d 1312, 1315 (11th Cir. 1999) (using this definition to determine the materiality of a false statement in a bank fraud

case). Because the issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement. *See Gregg*, 179 F.3d at 1315.

Indeed, a false statement can be material even if the decision maker actually knew or should have known that the statement was false. *See United States v. Johnson*, 139 F.3d 1359, 1364 (11th Cir. 1998) (stating that actual knowledge "is not a defense to the 'materiality' requirement" in the context of discussing whether a false statement is material under 18 U.S.C. § 1001), *cert. denied*, — U.S. —, 119 S. Ct. 2365 (1999); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976)[4] ("The natural and probable tendency of the affidavit to influence the decision to be made must be judged by the content of the document itself and not by any special knowledge possessed or acquired by the [Internal Revenue] Service.").[5]

Before examining whether there was any evidence that could lead a rational jury to conclude that Neder's falsehoods were not material to the lenders, we also address

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[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[5] *See also United States v. Rogers*, 118 F.3d 466, 472 (6th Cir. 1997) ("The statement need not actually influence the agency, but it must have the capacity to do so. . . . 'A false statement can be material even if the agent to whom it is made knows that it is false.'" (quoting *United States v. LeMaster*, 54 F.2d 1224, 1230-31 (6th Cir. 1995)); *United States v. Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988) ("The issue is whether the statements, viewed alone, were capable of influencing the function of the FDIC. It is irrelevant what the agent who heard the statement knew at the time the statement was made.").

at the outset Neder's general contentions regarding the Government's burden of proof here. Neder claims the Supreme Court held that the failure to instruct on materiality can never be harmless error unless the Government shows both that Neder never contested materiality and that the evidence overwhelmingly supports the materiality of every charged falsehood. However, the Supreme Court did not hold that omission of an element can never be harmless error unless uncontested.[6] Indeed, the Supreme Court emphasized that the correct focus of harmless-error analysis is: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, — U.S. at —, 119 S. Ct. at 1838. Stated another way, the focus is whether "the jury verdict would have been the same absent the error" or "whether the record contains evidence that could rationally lead to a contrary finding with respect to [materiality]." *Neder*, — U.S. at —, 119 S. Ct. at 1837, 1839.

Thus, whether Neder contested materiality may be considered but is not the pivotal concern. Instead, what the

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[6] The language from the Supreme Court's opinion that Neder cites to support his argument on this point is taken out of context. The Supreme Court concluded that the materiality of Neder's false statements for purposes of the tax fraud counts was supported by evidence "so overwhelming, in fact, that Neder did not argue to the jury—and does not argue here—that his false statements of income could be found immaterial." *Neder*, — U.S. at —, 119 S. Ct. at 1837. The Supreme Court went on to state, "[i]n this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id.* Considered in context, the Supreme Court's statement clearly does not mean that omission of an element of an offense can never be harmless error unless uncontested. The statement means only that the fact materiality was not contested supports the conclusion that the jury's verdict would have been the same absent the error.

evidence showed regarding materiality is the touchstone. Indeed, as outlined in the following, more specific discussion relating to the counts at issue, the Government's evidence of materiality for each of these bank, mail, and wire fraud counts is overwhelming.

Under harmless-error analysis, the Government also is not required to prove that the evidence overwhelmingly supports the materiality of *every* falsehood alleged for each mail, wire, or bank fraud count. *See United States v. Toney*, 598 F.2d 1349, 1355-56 (5th Cir. 1979) ("In mail fraud cases the government need not prove every allegation of fraudulent activities appearing in the indictment. It need only prove a sufficient number of fraudulent activities to support a jury inference that there was a fraudulent scheme."). Instead, the Government must show that the evidence of materiality is so overwhelming for enough of the falsehoods charged in a particular count that no rational jury, properly instructed on the element of materiality, could have acquitted Neder on that count.[7]

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[7] To support his argument that his conviction should be reversed if just one of the falsehoods alleged to support a count could have been found not material, Neder relies primarily on *Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466 (1991) and *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), *cert denied*, — U.S. —, 119 S. Ct. 1111 (1999). However, these cases do not involve harmless-error analysis; they involve the principle that "[a] general verdict which may rest upon an insufficient legal theory must be reversed." *Shotts*, 145 F.3d at 1293 n.3 (citing *Griffin*, 502 U.S. at 57, 112 S. Ct. at 473). From this principle, Neder incorrectly assumes that if a jury rationally could have found that one of the falsehoods alleged for a particular count was not material, that would necessarily mean Neder's conviction was based on a "legally insufficient theory." In making this assumption, Neder stretches the meaning of "legally insufficient theory" and overlooks that, if no jury rationally could conclude that his other falsehoods were not material, his conviction actually would be based on a "legally sufficient theory," despite the one,

Additionally, we observe that the jury-instruction error did not "vitiat[e] all the jury's findings," even though it did "prevent the jury from making a finding on the element of materiality." *Neder*, — U.S. at —, 119 S. Ct. at 1834. Thus, in our harmless error analysis, we accept that the jury found that Neder's representations were falsehoods, and our inquiry on remand is only whether those falsehoods were material. With this background in mind, we now consider the evidence of materiality relating specifically to the land-acquisition-loan fraud counts and then to the development-loan fraud counts.

A. Land Acquisition Loans

In Counts 2 through 12, 21 through 23, 26 through 28, and 30 through 33, Neder was charged with defrauding lenders in obtaining land acquisition loans by (1) submitting inflated appraisals; (2) submitting sales contracts between his nominee corporations and limited partnerships that falsely stated that down payments had been made to the corporations; (3) concealing that the land was being purchased from the original landowners at prices lower than the inflated prices being paid by the limited partnerships; (4) misrepresenting or failing to disclose the nature of his interest in the nominee corporations; and (5) failing to disclose that he was depositing in his personal account the excess loan proceeds his corporations received from the sales to his limited partnerships.

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immaterial falsehood. As the discussion in the text above indicates, harmless-error analysis requires us to focus on whether a jury rationally could have reached a different verdict if properly instructed, not on the materiality of each falsehood alleged in the indictment. To the extent Neder is continuing to challenge the application of harmless-error analysis to his bank, mail, and wire fraud convictions, we remind Neder that the Supreme Court already has resolved that issue. *See Neder*, — U.S. at —, 119 S. Ct. at 1841.

Neder's main argument that these representations were not material is that the lenders either knew or should have inquired about what Neder was doing but did not care that Neder was using the corporations as nominees in a "land-flipping" transaction, "netting" the down payment, and depositing the excess loan proceeds in his personal account. Neder introduced evidence that these practices were common in the 1980s and argued that the lenders had a duty to inquire about whether Neder was engaging in them. Neder also claims that these falsehoods were not material because he personally guaranteed the loans and, as a result, the lenders were fully secured. However, Neder's arguments are really about what the lenders knew or should have known and whether the lenders reasonably relied on Neder's representations—not whether Neder's representations were material.

Indeed, the evidence overwhelmingly establishes that Neder's representations about his appraisals, purchase prices, down payments, control over the nominee corporation, and receipt of the corporation's excess loan proceeds were material, whether considered individually or collectively, because they tended to influence or were capable of influencing the lenders' decisions. The Government elicited testimony from all of the lenders that if they had known the truth, they would not have approved Neder's land acquisition loans on the same terms and conditions, if at all. Each of these representations related to the core requirements for a land-acquisition loan. In particular, the lenders testified that the representations about prices and down payments were crucial to their decisions about approving the loans and about how much money to lend.

Regarding the appraisals, Neder points out that he was acquitted on Counts 13 to 20, which charged him with making false statements, in violation of 18 U.S.C. § 1014, for

submitting these appraisals to the lenders. Neder argues that the jury must have found that the appraisals were not false and that, based this finding, the jury might also have concluded that the appraisals were not material, if given the opportunity. However, Neder does not contend that the appraisals did not tend to influence or were not capable of influencing the lenders' decisions; Neder's challenge is directed at whether the element of falsity—and not materiality—was satisfied with regard to the appraisals. Neder's challenge to the jury's determination that the element of falsity was satisfied for purposes of the bank, mail, and wire fraud counts was not raised before the Supreme Court, and the Supreme Court remanded this case for us to consider only the materiality of Neder's falsehoods. *See Neder*, — U.S. at —, 119 S. Ct. at 1841. Thus, the jury's verdict having determined falsity, we are limited to deciding only whether Neder's false appraisals were material. Because, as already discussed, there was overwhelming evidence that these appraisals tended to influence and were capable of influencing the lenders' decisions, a rational jury could not have concluded that the appraisals were not material.

Count 32 also merits special discussion. For Count 32, the Government introduced evidence that the lender, Greyhound, had required Neder to verify the source of the $1,020,900 down payment he supposedly had paid. In response to this request for verification, Neder had submitted an affidavit to Greyhound, falsely swearing that the source of the deposit was a trust for the benefit of his children. At trial, Neder offered evidence that after he submitted the affidavit, the loan was restructured and became a collateral loan, based solely on the value of the land. Consequently, the representations about Neder's down payment were no longer a basis for the loan. In his closing argument, Neder argued

that after this change, the representations in the affidavit were "meaningless" to Greyhound.

From this evidence that the loan became a collateral loan, a jury rationally could have concluded that Neder's representations about making the down payment were not material to Greyhound. However, this does not mean Neder's conviction on Count 32 must be reversed. Neder's representations about the down payment were only one aspect of the scheme relating to the Greyhound loan, and as discussed previously, the Government is not required to prove the materiality of every allegation of fraudulent activities appearing in an indictment for a fraud conviction. *See United States v. Toney*, 598 F.2d 1349, 1355-56 (5th Cir. 1979).

In Count 32, Neder also was charged with making false representations about his purchase price, control over the nominee corporation, and receipt of the excess loan proceeds. The evidence relating to the materiality of each of these representations was so overwhelming that no jury rationally could have found that the representations were not a material matter. The Government introduced evidence that Greyhound was influenced in its decision to make a collateral loan by Neder's representations about the purchase price. If Greyhound had known that Neder controlled both the seller-corporation and buyer-partnership, and that the actual, initial purchase price paid by Neder's corporation was so much less than the inflated price, the evidence indicates that Greyhound would not have agreed to make a collateral loan, or at least would not have lent Neder as much money as it did. Neder would have received only seventy to seventy-five percent of the much lower, actual purchase price rather than seventy to seventy-five percent of the inflated price. Thus, even assuming the false statements concerning the down payment were not material, the jury verdict would have been the same for Count 32.

Because, for each of these land-acquisition fraud counts, no jury rationally could have concluded that the element of materiality had not been established, the district court's instructional error was harmless.

B. Development Loans

1. Cedar Creek and Southern Grove

Counts 34 and 35 charged Neder with committing mail fraud in meeting Amerifirst's and Security's pre-construction sales requirements for the Cedar Creek and Southern Grove development loans, respectively. Neder met these development loan requirements through a scheme in which he solicited individuals to sign reservation agreements or sales contracts indicating their interest in or commitment to buying condominium units to be constructed at Cedar Creek and Southern Grove and then paid the deposits for those purported buyers. The language of the contracts did not reveal that it was Neder rather than the purported buyers who made the deposits, nor did Neder disclose to Amerifirst or Security that he paid the deposits.[8]

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[8] Neder also was charged with forging buyers' signatures on two of the Southern Grove reservation agreements. Neder does not appear to contest the materiality of these forged signatures. Even if he did, the evidence clearly indicates that these signatures tended to influence or were capable of influencing Security's decision about Neder's Southern Grove development loan. Security's loan officer testified that Security required Neder to submit twenty-five reservation agreements to establish the marketability of the Southern Grove project, and that marketability was an important consideration for Security in determining whether to lend money to this type of project. From Security's perspective, these two signatures represented two interested, potential purchasers of Southern Grove condominium units. Because these signatures clearly tended to influence or were capable of influencing Security's decision, no jury rationally could have found that this evidence was not material.

Neder claims that his representations about the deposits were not material because Amerifirst and Security knew or should have known he was making these deposits. Neder points out that the reservation agreements and purchase contracts he submitted to Amerifirst and Security did not expressly state that the purchaser made the deposit; as a result, Neder contends that the contracts were "literally true." At trial, Neder also introduced evidence that "equity sharing" agreements, where a developer would pay a deposit or down payment to provide an incentive for an individual to sign a purchase contract, were an accepted practice, common in the 1980s. According to Neder, if Amerifirst or Security truly cared who paid the deposits, they could have contacted the buyers to ask about the source of the deposits or clearly stated in the loan agreements that only the buyer, and not Neder, could make the deposit.

Neder's arguments relate to what Amerifirst and Security knew or should have known about who was making the required deposits, whether Amerifirst and Security reasonably relied on Neder's representations, and whether Neder's representations were actually false. Whether the element of falsity was satisfied for Counts 34 and 35 was already decided by the jury and is not an issue on remand. *See Neder*, — U.S. at —, 119 S. Ct. at 1834, 1841. As for the other issues Neder raises, Neder's arguments about actual knowledge and reasonable reliance miss the point of the materiality inquiry, which is whether the falsehoods at issue had a tendency to influence or were capable of influencing Amerifirst's and Security's decisions about Neder's development loans. *See Gaudin*, 515 U.S. at 509, 115 S. Ct. at 2313; *Gregg*, 179 F.3d at 1315.

The tendency and capability of Neder's representations to influence Amerifirst's and Security's decisions were established by overwhelming evidence. Loan

officers from both Amerifirst and Security testified that the reason they wanted Neder to establish that a certain number of prospective purchasers had signed either reservation agreements or purchase contracts and had made the required down payments was to provide an indication of the marketability of the condominiums Neder planned to build at Cedar Creek and Southern Grove, respectively. According to the loan officers, this marketability information was of great importance because it allowed them to gauge whether Neder would be able to make enough sales to repay the loan—in other words, the risk involved in lending money for the projects' development. The information that Neder had to offer to pay deposits to induce people to sign reservation agreements and contracts for Cedar Creek and Southern Grove would have indicated that the market for these condominiums was not as strong as Neder represented and that the risk involved in lending money for development would be greater. Because of the tendency and capability of Neder's representations to influence Amerifirst's and Security's decisions about these development loans, no jury rationally could have concluded that the representations were not material. Thus, the district court's failure to instruct on materiality was harmless error as to these counts.

2. Reddie Point

Counts 78 to 84 charged Neder with committing wire fraud through a scheme in which he submitted false invoices to support draw requests on a loan he had obtained from the Union for construction at Reddie Point. Through these invoices and draw requests, Neder falsely represented that he had paid for work performed at Reddie Point when, in reality, he had not paid for the work or the work was not actually performed at Reddie Point.

As part of his defense to these charges, Neder testified that the Union's representatives, Adler and Burns, had authorized and encouraged Neder to make false construction draw requests and knew that Neder was submitting false invoices to support his false draw requests. Adler and Burns testified to the contrary. According to Neder, this conflicting testimony raises a credibility issue relating to materiality that should have been resolved by the jury. Neder reasons that if the jury believed his testimony that Adler and Burns knew Neder's representations were false and still disbursed the funds Neder requested, the jury rationally could have found that Neder's representations did not actually influence the Union's decision about whether to pay the draw requests.

However, as the Government correctly responds, Neder's arguments relate to his intent in submitting the false draw requests and the Union's knowledge of the falsity of those requests but not to the materiality of Neder's false representations about his expenditures and the work completed at Reddie Point. As discussed previously, false statements can be material even if a decision maker was not actually influenced by those statements and knew they were false. *See Johnson*, 139 F.3d at 1364. Again, what is relevant to the materiality inquiry is whether Neder's representations have "a natural tendency to influence, or [are] capable of influencing, the decision of the decisionmaking body to which [they are] addressed"—here, the Union's decision to pay Neder's draw requests. *See Gaudin*, 515 U.S. at 509, 115 S. Ct. at 2313.

The evidence established that, under the loan agreement, the Union agreed to reimburse Neder only for work actually performed at Reddie Point, not for future work at Reddie Point or for work performed at other projects. Consequently, Neder's representations in the draw requests about the amounts he had expended for work performed at

Reddie Point were capable of influencing the Union's decision about whether to pay Neder's draw requests and, if so, how much money should be disbursed to Neder. Because this evidence overwhelmingly indicates the materiality of Neder's representations, it is clear beyond a reasonable doubt that the jury verdict on these counts would have been the same absent the district court's instructional error. Thus, the instructional error was harmless.

3. The View

In Count 77, Neder was charged with attempted bank fraud for falsely representing to Central Bank that there was a legitimate $280,000 second mortgage on The View property and that the second mortgage was in favor of an existing trust. Neder sought to have Central Bank pay the $280,000 second mortgage as part of a development loan for The View project.

Neder challenges the materiality of his representation that the $280,000 mortgage was in favor of an existing trust, arguing that he presented evidence that he was in the process of creating the trust at the time he made the representation and thus it was not material. However, with this argument, Neder is addressing the falsity, and not the materiality, of his representation about the existence of the trust.

The evidence overwhelmingly establishes that Neder's representations about the existence and amount of this second mortgage had a natural tendency to influence, or were at least capable of influencing, Central Bank's decisions to commit to the loan and to agree to pay the outstanding balance of the existing debt on the property. For instance, the testimony of Central Bank's loan officer clearly indicates that the existence and amount of the $280,000 mortgage were facts crucial to Central Bank in making these decisions. Based on the evidence, a jury could not rationally have concluded that Neder's representations were not material. In

other words, the failure to instruct on materiality did not contribute to the verdict obtained. Thus, the district court's instructional error was harmless with respect to this count.

III. CONCLUSION

Because we have determined the district court's failure to instruct the jury on materiality was harmless error, we affirm Neder's convictions for bank fraud, mail fraud, and wire fraud. In light of this disposition, we find it unnecessary to review Neder's convictions for Counts 1, 89, and 90—the general conspiracy and RICO violations counts predicated on the mail and wire fraud charges.

AFFIRMED.

18 U.S.C. § 1341

18 U.S.C. § 1341, as currently in effect, provides as follows:

"**§ 1341. Frauds and swindles.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. § 1343

18 U.S.C. § 1343, as currently in effect, provides as follows:

"§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. § 1344

18 U.S.C. § 1344, as currently in effect, provides as follows:

"**§ 1344. Bank fraud.**

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

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No. 99-1504

In the Supreme Court of the United States

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
DAVID S. KRIS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

22pp

QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jury on the materiality element of petitioner's mail, wire, and bank fraud offenses was harmless error.

2. Whether a false statement can be material in a fraud prosecution if the victim of the fraud is aware that the statement is false.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988)	17
Brogan v. *United States*, 522 U.S. 398 (1998)	16
Chapman v. *California*, 386 U.S. 18 (1967)	2, 11
Convergent Techs. Sec. Litig., In re, 948 F.2d 507 (9th Cir. 1991)	17
Griffin v. *United States*, 502 U.S. 46 (1991)	5, 9, 10
Keating v. *Hood*, 191 F.3d 1053 (9th Cir. 1999)	11, 12
Kungys v. *United States*, 485 U.S. 759 (1988)	16
Parnes v. *Gateway 2000, Inc.*, 122 F.3d 539 (8th Cir. 1997)	18
Pope v. *Illinois*, 481 U.S. 497 (1987)	3, 11
Rose v. *Clark*, 478 U.S. 570 (1986)	3, 11
Shaw v. *Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996)	18
United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987)	15, 18
United States v. *Gaudin*, 515 U.S. 506 (1995)	2
United States v. *Goldfine*, 538 F.2d 815 (9th Cir. 1976)	15, 18
United States v. *Ienco*, 92 F.3d 564 (7th Cir. 1996)	12
United States v. *Johnson*, 139 F.3d 1359 (11th Cir. 1998), cert. denied, 119 S. Ct. 2365 (1999)	15
United States v. *LeMaster*, 54 F.3d 1224 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996)	15
United States v. *Toney*, 598 F.2d 1349 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980)	6

Cases–Continued: Page

United States v. *Whitaker*, 848 F.2d 914 (8th Cir. 1988) 15, 18
Yates v. *Evatt*, 500 U.S. 391 (1991) 3, 12
Yates v. *United States*, 354 U.S. 298 (1957) 9, 10

Statutes:

Securities Exchange Act of 1934, § 10(b), 15 U.S.C. 78j(b) 17
18 U.S.C. 371 2
18 U.S.C. 924(c) (1994) 12
18 U.S.C. 1001 (1994) 2, 16
18 U.S.C. 1014 (1994) 2
18 U.S.C. 1341 2
18 U.S.C. 1343 2
18 U.S.C. 1344 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 7206(1) 2

In the Supreme Court of the United States

No. 99-1504

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 197 F.3d 1122.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1999. The petition for a writ of certiorari was filed on March 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C.

1962(c)); conspiring to commit that offense (18 U.S.C. 1962(d)); conspiring to defraud a financial institution (18 U.S.C. 371); nine counts of mail fraud (18 U.S.C. 1341); 10 counts of wire fraud (18 U.S.C. 1343); 12 counts of bank fraud (18 U.S.C. 1344); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months of imprisonment, to be followed by five years of supervised release, and was ordered to pay approximately $25 million in restitution. The court of appeals affirmed. 136 F.3d 1459 (1998). This Court affirmed in part, reversed in part, and remanded. 527 U.S. 1 (1999). On remand, the court of appeals again affirmed petitioner's convictions and sentence. Pet. App. 1a-23a.

1. In its prior decision in this case, this Court held that materiality is an element of the mail, wire, and bank fraud statutes under which petitioner was convicted. 527 U.S. at 25. The Court further explained that, "[i]n general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed.'" *Id.* at 16 (quoting *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (describing meaning of materiality under 18 U.S.C. 1001)). Petitioner's jury was not instructed on materiality, and the Court therefore concluded that his trial involved legal error. See *id.* at 25.

The Court also held that the instructional error in petitioner's trial could be harmless under the standard of *Chapman* v. *California*, 386 U.S. 18 (1967): "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" 527 U.S. at 18. In support of that holding, the

Court cited its prior decisions in *Rose* v. *Clark*, 478 U.S. 570 (1986), *Pope* v. *Illinois*, 481 U.S. 497 (1987), and *Yates* v. *Evatt*, 500 U.S. 391 (1991), which involved jury instructions containing unconstitutional presumptions and misdescriptions of elements. See 527 U.S. at 9-10. Because the court of appeals had not applied a harmless-error standard to petitioner's fraud counts, the Court "remand[ed] this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless." *Id.* at 25.[1]

2. On remand, the court of appeals affirmed. Pet. App. 1a-23a. The court concluded that the district court's failure to instruct on materiality was harmless because "the Government's evidence of materiality for each of the[] bank, mail, and wire fraud counts is overwhelming." *Id.* at 13a. In keeping with this Court's description of petitioner's criminal conduct, the court of appeals divided the fraud counts into two main groups: (1) those relating to land acquisition (Counts 2-12, 21-23, 26-28, and 30-33) and (2) those relating to land development (Counts 34-35 and 77-84). Compare 527 U.S. at 4-6 with Pet. App. 3a-9a, 14a-23a. The land acquisition charges involved "land flip" transactions: petitioner would purchase land using a shell corporation, resell the land at a much higher price to a limited partnership that he controlled, and finance the resale with a loan, pocketing the "profit" from the sale. See Pet. App. 14a-16a. With respect to the second group of

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[1] This Court affirmed petitioner's tax fraud offenses because it concluded that the instructional error concerning materiality was harmless with respect to those offenses. 527 U.S. at 19-20. Petitioner's present claims concern only his convictions for mail, wire, and bank fraud; he makes no independent claim of error with respect to his other offenses. See Pet. 3-4; Pet. App. 23a.

charges, concerning land development, petitioner misrepresented various facts and submitted false work invoices to lenders in connection with several construction loans. See *id.* at 18a-23a.

a. Each of the fraud counts relating to land acquisition charged petitioner with making more than one misrepresentation of a material fact in connection with a loan. See Redacted Indictment 11-13 (describing methods of land acquisition fraud), 52, 58, 62-63 (incorporating that description into the corresponding mail, wire, and bank fraud charges). In particular, petitioner was alleged to have obtained the loans by

> (1) submitting inflated appraisals; (2) submitting sales contracts between his nominee corporations and limited partnerships that falsely stated that down payments had been made to the corporations; (3) concealing that the land was being purchased from the original landowners at prices lower than the inflated prices being paid by the limited partnerships; (4) misrepresenting or failing to disclose the nature of his interest in the nominee corporations; and (5) failing to disclose that he was depositing in his personal account the excess loan proceeds his corporations received from the sales to his limited partnerships.

Pet. App. 14a. The court of appeals found that "the evidence overwhelmingly establishes that [petitioner's] representations" about each of those five categories—"his appraisals, purchase prices, down payments, control over the nominee corporation, and receipt of the corporation's excess loan proceeds"—"were material, whether considered individually or collectively." *Id.* at 15a. Thus, the court affirmed petitioner's convictions on Counts 2-12, 21-23, 26-28, 30-31, and 33. *Id.* at 18a.

The court identified one exception to its conclusion concerning the land acquisition charges, stating that Count 32, which charged wire fraud of Greyhound Leasing & Financial Corporation, "merits special discussion." Pet. App. 16a. The court acknowledged that a rational jury could have found that petitioner's "representations about making the down payment"—the second of the five identified categories of falsehoods—"were not material" to Greyhound. *Id.* at 17a. But the court concluded that "this does not mean [petitioner's] conviction on Count 32 must be reversed." *Ibid.* Count 32 also alleged that petitioner made misrepresentations "about his purchase price, control over the nominee corporation, and receipt of the excess loan proceeds." *Ibid.* The court concluded that "[t]he evidence relating to the materiality of each of these representations was so overwhelming that no jury rationally could have found that the representations were not a material matter." *Ibid.* Thus, the court held, "even assuming the false statements concerning the down payment were not material, the jury verdict would have been the same for Count 32." *Ibid.*

In upholding Count 32 on this theory, the court of appeals rejected petitioner's claim, based primarily on *Griffin* v. *United States*, 502 U.S. 46 (1991), that "his conviction should be reversed if just one of the falsehoods alleged to support a count could have been found not material." Pet. App. 13a n.7. The court explained that *Griffin* did "not involve harmless-error analysis." *Ibid.* It reasoned that "harmless-error analysis requires us to focus on whether a jury rationally could have reached a different verdict if properly instructed." *Id.* at 14a n.7.

The court held that, under harmless-error analysis, "the Government * * * is not required to prove that

the evidence overwhelmingly supports the materiality of *every* falsehood alleged for each mail, wire, or bank fraud count." Pet. App. 13a. The court explained that, because wire fraud consists of an individual use of the wires in furtherance of a fraudulent scheme, the government "need not prove every allegation of fraudulent activities appearing in the indictment. It need only prove a sufficient number of fraudulent activities to support a jury inference that there was a fraudulent scheme." *Ibid.* (quoting *United States* v. *Toney*, 598 F.2d 1349, 1355-1356 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980)). Thus, the court concluded, to establish that the failure to instruct on materiality was harmless with respect to a particular count, the government need show only that "the evidence of materiality is so overwhelming for enough of the falsehoods charged in [that] count that no rational jury, properly instructed on the element of materiality, could have acquitted [petitioner] on that count." *Ibid.*[2]

b. The court of appeals also affirmed the convictions relating to land development. Pet. App. 18a-23a. Counts 34 and 35 charged petitioner with mail fraud based on his false representations that various individuals had paid deposits and signed commitments to buy condominiums that he was developing with the aid of loans obtained from two lenders. The court concluded that petitioner's misrepresentations were material because their "tendency and capability * * * to

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[2] Because the failure to instruct the jury on materiality did not "vitiate all the jury's other findings," Pet. App. 14a (quoting 527 U.S. at 11), and petitioner had not previously challenged the findings on falsity, *id.* at 16a, the court "accept[ed] that the jury found that [petitioner's] representations were falsehoods" and limited its "inquiry on remand" to "whether those falsehoods were material," *id.* at 14a.

influence [the lenders'] decisions were established by overwhelming evidence." Pet. App. 19a. The court noted that loan officers testified that petitioner's representations were "of great importance because [the representations] allowed them to gauge whether [petitioner] would be able to make enough sales to repay the loan." *Id.* at 20a. Based on that evidence, the court concluded that "no jury rationally could have concluded that the representations were not material." *Ibid.*

Petitioner claimed that his representations were not material because the lenders "knew or should have known he was making [the] deposits" himself. Pet. App. 19a. He also contended that his statements to the lenders were "literally true" because he did not "expressly state that the purchaser made the deposit." *Ibid.* The lenders "could have contacted the buyers to ask about the source of the deposits or clearly stated in the loan agreements that only the buyer, and not [petitioner], could make the deposit." *Ibid.* The court of appeals concluded that petitioner's claims related to whether the lenders "reasonably relied on [his] representations, and whether [his] representations were actually false." *Ibid.* The court said that petitioner's "arguments about actual knowledge and reasonable reliance miss the point of the materiality inquiry, which is whether the falsehoods at issue had a tendency to influence or were capable of influencing [the lenders'] decisions about [petitioner's] development loans." *Ibid.*

The court reached a similar conclusion with respect to Counts 78-84, which charged petitioner with submitting false construction invoices to support the periodic disbursement of loan proceeds. The invoices were "overwhelmingly" material, the court concluded, be-

cause the lender had "agreed to reimburse [petitioner] only for work actually performed * * * not for future work * * * or for work performed at other projects." Pet. App. 21a-22a. Petitioner claimed the invoices were not material because the lender knew that they were false. *Id.* at 21a. The court held that petitioner's "arguments relate to his intent in submitting the false draw requests and the [lender's] knowledge of the falsity of those requests but not to the materiality of [petitioner's] false representations." *Ibid.* The court repeated its observation that "false statements can be material even if a decision maker was not actually influenced by those statements and knew they were false." *Ibid.*

Finally, with respect to Count 77, the court again found that the "evidence overwhelmingly establishes" the materiality of petitioner's misrepresentations to the lender. Pet. App. 22a. Petitioner told a bank that he needed funds to pay off a second mortgage in favor of an existing trust as part of the development of a piece of property. *Ibid.* Petitioner claimed that his statement was immaterial because, although the trust was not in existence, he was "in the process of creating the trust" at the time he made the statement. *Ibid.* The court of appeals rejected that argument in part because it concerned the falsity rather than the materiality of the statement. *Ibid.* Thus, the court of appeals affirmed all of petitioner's fraud convictions. *Id.* at 23a.

ARGUMENT

1. Petitioner first contends (Pet. 8-17) that the court of appeals erred in affirming his land acquisition convictions without finding that *all* of the false statements involved in each count were overwhelmingly material. He further contends that the approach of the court of

appeals conflicts with this Court's decisions in *Yates* v. *United States*, 354 U.S. 298 (1957), and *Griffin* v. *United States*, 502 U.S. 46 (1991), as well as decisions of other courts of appeals. Petitioner's claims of conflict are incorrect, and he would not be not entitled to relief even under the approach to harmless error review that he advocates. This Court's review is therefore not warranted.

a. In challenging the harmlessness determination on the land acquisition charges, petitioner focuses on Count 32 but also maintains that it "is not an isolated example." Pet. 11 & n.2. With respect to the other counts, however, the court of appeals concluded that all five categories of petitioner's misrepresentations were overwhelmingly "material, whether considered individually or collectively." Pet. App. 15a. Thus, even if petitioner's legal theory were correct, he would not be entitled to relief on those counts. In a footnote (Pet. 11 n.2), petitioner appears to challenge the court of appeals' fact-intensive determination of the strength of the evidence concerning materiality. That challenge does not merit this Court's review.

b. With respect to Count 32, petitioner argues (Pet. 8-17) that reversal is warranted because one of the false statements that he made was arguably not material. That argument depends on the highly unlikely premise that the jury, which convicted petitioner on 73 of 81 charges involving massive fraud (Pet. App. 2a n.2), relied on only one of the five misrepresentations alleged by the government when it convicted petitioner on Count 32 and that the representation it selected happened to be the only one that it rationally could have found to be immaterial. Even if that premise were plausible, however, petitioner's claim would not warrant further review.

Petitioner relies primarily (Pet. 12-14) on *Yates* and *Griffin*. The defendants in *Yates* were charged with conspiring both to "advocate and teach" the violent overthrow of the United States and to "organize" the Communist Party. 354 U.S. at 300. The Court found that the "organizing" object of the conspiracy was legally inadequate because the Communist Party had been "organized" (within the meaning of the statutory prohibition) when it was founded, outside the period set by the statute of limitations. *Id.* at 311-312. Although the "advocate and teach" object was valid, the Court reversed the conspiracy conviction because "the verdict [was] supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312.

In *Griffin*, the Court explained that *Yates* was an "unexplained" (502 U.S. at 55) extension of earlier cases holding that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Id.* at 53.[3] After explaining that "continued adherence to the holding in *Yates* [was] not at issue in [*Griffin*]," *id.* at 56, the Court refused to extend *Yates* to situations in which the verdict may have rested on a ground that is factually inadequate (because it is not supported by sufficient evidence) rather than legally inadequate (because, as in *Yates*, it is not supported by the language of the statute), see *id.* at 56-60.

Yates and *Griffin* do not conflict with the decision of the court of appeals here. Neither of those cases involved the application of the harmless error rule of

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[3] There is no contention here that petitioner may have been convicted based on conduct that is constitutionally protected.

Chapman v. *California*, 386 U.S. 18 (1967), which had not even been decided at the time of *Yates*. The government contended in *Yates* and *Griffin* that the defendants' convictions should stand because the juries' verdicts *might actually* have rested on adequate rather than inadequate grounds. The government did not rely in either case on the principle that the Court, in its initial decision in this case, held the government may invoke here—that a defendant's conviction may stand, even though the jury's verdict indisputably rested on a legally inadequate ground, if it is clear beyond a reasonable doubt that any rational jury would have found the defendant guilty absent the error.[4]

The result here is governed, not by *Yates* and *Griffin*, but by this Court's initial decision in this case, which relied on its earlier decisions involving harmless error and jury instructions. See *Neder*, 527 U.S. at 9-10 (citing *Rose* v. *Clark*, *supra*; *Pope* v. *Illinois*, *supra*;

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[4] For similar reasons, the decision of the court of appeals does not conflict with the Ninth Circuit's decision in *Keating* v. *Hood*, 191 F.3d 1053 (1999). In that case, the jury instructions described two separate ways of finding the defendant guilty—either as a direct participant or as an aider and abettor. The aiding and abetting instructions were correct, but the instructions describing the direct theory of guilt omitted a required mens rea element. *Id.* at 1057. The State did "*not* argue that * * * the instructional error was harmless" based on overwhelming evidence of the omitted mens rea element. *Id.* at 1062. The State's only argument was that the jury actually convicted the defendant on the aiding-and-abetting theory rather than the direct-participant theory. *Ibid.* The court of appeals rejected that argument. See *id.* at 1063-1064 & n.16. Moreover, in a footnote, the court of appeals specifically found that the evidence of the omitted mens rea element was *not* overwhelming and therefore concluded that the instructional error could not be harmless "under any of the possible approaches" to determining harmless error. *Id.* at 1064 n.17.

and *Yates* v. *Evatt*, *supra*). *Neder* establishes that, when jury instructions either misdefine or omit an element, the error is harmless if the reviewing court determines beyond a reasonable doubt that the "verdict would have been the same absent the error." 527 U.S. at 19. As the court of appeals recognized (Pet. App. 13a n.7), the fundamental holding of this Court's initial decision in this case is that reviewing courts may affirm a conviction despite a "'gap' between what the jury did find * * * and what it was required to find" (527 U.S. at 13-14) if the record evidence could not rationally support a verdict for the defendant. See *id.* at 19.[5]

This Court's resolution of any tension that may exist between its earlier holding in this case and the principle underlying *Yates* and *Griffin*, see *Keating* v. *Hood*, 191 F.3d 1053, 1064 n.17 (9th Cir. 1999); *id.* at 1068 (Rymer, J., concurring in part and dissenting in part), would be premature at this time. There is no conflict among the courts of appeals on that question; the decision of the court of appeals on remand is the first decision to address that issue. See notes 4-5, *supra*; *Keating*, 191 F.3d at 1064 n.17 (reserving question).[6]

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[5] To the extent that petitioner invokes (Pet. 12) appellate decisions that, in reliance on *Yates* and *Griffin*, reject the principle that this Court endorsed in its initial opinion in this case, those decisions predate that opinion, on which the court of appeals here relied, and therefore they do not present a square conflict with the decision in this case. See, *e.g.*, *United States* v. *Ienco*, 92 F.3d 564, 570 (7th Cir. 1996) (reversing conviction under 18 U.S.C. 924(c), which makes it a crime to "use[]" or "carr[y]" a firearm in certain circumstances, based on an erroneous "use" instruction and despite the government's claim that there was "conclusive" evidence of carrying).

[6] In addition, the court of appeals appears to have been influenced in its analysis by its understanding of the instructions on remand from this Court. See Pet. App. 10a (describing remand on

c. This Court's review is particularly unwarranted because petitioner would not be entitled to relief even under the harmless error analysis that he advocates. Petitioner contends that the government should be required "to show that the evidence of all the elements of * * * wire * * * fraud—including intent and falsity, as well as materiality—was so overwhelming with respect to some falsehood alleged in [Count 32] that no jury could have acquitted." Pet. 10. The evidence satisfies that proposed standard for not just one but at least three of the falsehoods alleged in connection with Count 32—(1) petitioner's concealing that the land was purchased from the original landowner at a price lower than the inflated price paid by the limited partnership, (2) petitioner's failure to disclose his control over the nominee corporation that made the original purchase, and (3) petitioner's failure to disclose his intent to retain for himself the excess loan proceeds.

As described at page 5, *supra*, the court of appeals expressly and correctly determined that the evidence supporting the materiality of each of those falsehoods was overwhelming. See also Pet. App. 17a. The evidence of falsity was also overwhelming for each of the

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harmless error as follows: "To determine whether the removal of an element from the jury's consideration is harmless error, this Court is to consider 'whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" (quoting *Neder*, 527 U.S. at 19); see also *id.* at 14a ("[I]n our harmless error analysis, we accept that the jury found that [petitioner's] representations were falsehoods, and our inquiry on remand is only whether those falsehoods were material.") Those particular features of the case may limit or qualify the scope of the court's holding on the appropriate form of harmless error analysis in a case of this kind.

falsehoods. The evidence overwhelmingly showed that the inflated price that petitioner submitted to Greyhound was $2 million higher and more than twice the price that his nominee corporation had paid for the land only three days earlier. See 15 R. 234; 16 R. 104-105, 183-184; 20 R. 30-31. The evidence also overwhelmingly showed that petitioner misrepresented his true interest in the nominee corporation by stating he had no interest, even though he had instructed that it be created and had endorsed to himself the check for $730,269.26 that it received for the sale of the property. See 13 R. 14; 14 R. 33; 15 R. 218-234; 16 R. 89-96, 104-105, 107-108, 183-184; 20 R. 30-31; 43 R. 257-258; 44 R. 65-71. And the evidence overwhelmingly showed that petitioner deposited in his personal bank account the more than $730,000 in excess loan proceeds that the corporation received. 13 R. 85; 16 R. 222; 30 R. 136-139.

Finally, the evidence was overwhelming that petitioner made each of the falsehoods with the intent to defraud Greyhound. The evidence overwhelmingly established that petitioner knew that Greyhound would not have made the loan if it had been aware of the true price of the land, the fact that petitioner was both the buyer and the seller in the transaction reported to it, or the fact that he would personally profit by more than $730,000 from the distribution of the loan proceeds. See 16 R. 77, 87-96, 98-101, 104-108, 155, 167-176, 183-184.

Moreover, even if the evidence were not sufficient to sustain petitioner's conviction on Count 32, reversal of that count would not reduce petitioner's terms of imprisonment or supervised release. As noted at page 9, *supra*, petitioner was convicted of 73 of the 81 charges submitted to the jury. His five-year term of imprisonment for Count 32 was imposed concurrently with his terms of imprisonment for 61 of those other

convictions. Judgment 2. No supervised release was imposed in connection with Count 32. *Id.* at 3. Under those circumstances, further review of this case by this Court is not warranted.

2. With respect to his convictions on the land development charges, petitioner claims (Pet. 18-26) that the court of appeals erred in concluding that a false statement can be "material" even though the recipient of the statement knows it is false. Petitioner further contends that this conclusion conflicts with decisions of other courts of appeals. Those contentions lack merit.

a. In its prior decision in this case, the Court held that, in this context, a false representation generally is material if it has either "a natural tendency to influence" or is "capable of influencing" the victim. 527 U.S. at 16. The victim's knowledge that a representation is false is usually not relevant to whether that standard is satisfied because the standard turns on the representation's "*capability* of influencing" the victim, not its actual influence. *United States* v. *Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988). In other words, the test for materiality concerns "the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." *United States* v. *Goldfine*, 538 F.2d 815, 820-821 (9th Cir. 1976). Thus, the fact that the victim discovers the truth after the false statement is made, or knows about it in advance, generally does not make the statement any less material. See, *e.g.*, *United States* v. *Johnson*, 139 F.3d 1359, 1364 (11th Cir. 1998), cert. denied, 119 S. Ct. 2365 (1999); *United States* v. *LeMaster*, 54 F.3d 1224, 1230-1231 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996); *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987) (citing cases). As this Court stated in an analogous context, an exception from

liability for false statements that would "turn upon the credulousness of the [victim] (or the persuasiveness of the [defendant]) would be exceedingly strange." *Brogan* v. *United States*, 522 U.S. 398, 402 (1998) (rejecting "exculpatory no" exception to 18 U.S.C. 1001).

b. Petitioner mistakenly relies (Pet. 22-26) on this Court's decision in *Kungys* v. *United States*, 485 U.S. 759 (1988), in which the plurality stated that materiality turns on "what would have ensued from * * * knowledge of the misrepresented fact." *Id.* at 775 (opinion of Scalia, J., joined by Rehnquist, C.J., and Brennan, J.). The plurality made that statement in holding that a false statement is not material merely because, if the defendant had instead told the truth, that action would have influenced the victim by revealing the falsity of an earlier statement. "What must have a natural tendency to influence the [victim] is the misrepresentation *itself*, not the failure to create an inconsistency with an earlier misrepresentation." *Id.* at 776 (plurality opinion) (emphasis added).

Indeed, the Court in *Kungys* made clear that materiality does not turn on hindsight, but on "whether the misrepresentation or concealment was *predictably* capable of affecting, *i.e.*, had a natural tendency to affect," the victim. 485 U.S. at 771 (emphasis added). The Court made clear that it "has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Ibid.* Thus, as the court of appeals in this case understood, it does not matter what actually *would* have happened as a result of the false statement given the other information available to the victim, but what *could* have happened had that other information *not* been available.

c. Petitioner also errs in contending (Pet. 20-21) that the decision of the court of appeals here conflicts with decisions of other courts of appeals construing the securities laws. Those decisions involve different statutes and a different theory of harm and, in that context, materiality takes on a different meaning. Materiality in the securities context requires consideration of whether a particular representation "significantly altered the 'total mix' of information available." *Basic Inc.*, v. *Levinson*, 485 U.S. 224, 232 (1988). Because that standard considers the "total mix" of information, knowledge already possessed by investors is highly relevant. The standard at issue here, however, does not contain that element. See *Neder*, 527 U.S. at 16 ("natural tendency" test); *id.* at 22 n.5 (Restatement (Second) of Torts test).

Petitioner principally relies on the Ninth Circuit's decision in *In re Convergent Technologies Securities Litigation*, 948 F.2d 507 (1991), a "fraud on the market" case involving Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). The plaintiffs, purchasers of Convergent's stock, sued the corporation's officers and others for making misrepresentations in a prospectus. They claimed that the misrepresentations influenced the market price for the stock and that they were harmed because they relied on the integrity of the stock as established by the market price. 948 F.2d at 512-513 & n.2. The court held that an omission could be "materially misleading only if the information has not already entered the market." *Id.* at 513. Unlike the victims of the mail, wire, and bank frauds at issue in this case, the victims in *Convergent* did not claim that they were misled by the defendants' false statements, but by the actions of the market in reliance on the false statements. Because the market price reflected the

truth, however, the victims had not been deceived at all. Accord, *e.g.*, *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1206-1207 (1st Cir. 1996) (cited at Pet. 20) (rejecting fraud-on-the-market theory because "the investing public had at least a year's worth of hard financial data * * * to evaluate" the effect of a corporate policy change before the change was touted by the corporation as a means of boosting revenues).

As noted above, the courts of appeals, including the Ninth and First Circuits, continue to recognize that, in the context of the fraud involved in this case, a victim's knowledge does not render a false statement immaterial. See *Goldfine*, 538 F.2d at 820-821; *Corsino*, 812 F.2d at 30.[7] That is the question presented here, and it is one on which the courts of appeals are not divided. This Court's review is not warranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
DAVID S. KRIS
Attorney

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[7] As petitioner himself recognizes (Pet. 20-21), the Eighth Circuit likewise recognizes that materiality takes on a different meaning in the context of the securities laws than in the context presented here. Compare *Whitaker*, 848 F.2d at 916, with *Parnes* v. *Gateway 2000, Inc.*, 122 F.3d 539, 546 (1997).

(3)

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IN THE

Supreme Court of the United States

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT OF AUTHORITY REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *YATES* TO HARMLESS-ERROR REVIEW. 1

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO ELIMINATE THE SPLIT AMONG THE CIRCUITS OVER THE MEANING OF MATERIALITY IN THE FEDERAL LAW OF FRAUD. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 8, 9

Carmell v. *Texas*, 120 S. Ct. 1620 (2000) 5

Chapman v. *California*, 386 U.S. 18 (1967) 2, 3

Griffin v. *United States*, 502 U.S. 46 (1991) 2

Keating v. *United States*, 191 F.3d 1053 (9th Cir. 1999) 2, 3

Kungys v. *United States*, 485 U.S. 759 (1988) 7, 8, 9

Neder v. *United States*, 527 U.S. 1 (1999) ..... *passim*

Sibron v. *New York*, 392 U.S. 40 (1968) 5

United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987) ... 10

United States v. *Goldfine*, 538 F.2d 815 (9th Cir. 1976) .. 9

United States v. *Hastings*, 134 F.3d 235 (4th Cir.), *cert. denied*, 523 U.S. 1143 (1998) 3

United States v. *Ienco*, 92 F.3d 564 (7th Cir. 1996) 3

United States v. *Neder*, 136 F.3d 1459 (11th Cir. 1998), *aff'd in part and rev'd in part*, 527 U.S. 1 (1999) ..... *passim*

United States v. *Perkins*, 161 F.3d 66 (D.C. Cir. 1998) .. 3

TABLE OF AUTHORITIES — Continued

Page

Yates v. *United States*, 354 U.S. 298 (1957) 1, 2, 3

Statute

18 U.S.C. § 1001 9

REPLY BRIEF FOR PETITIONER

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT OF AUTHORITY REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *YATES* TO HARMLESS-ERROR REVIEW.

1. The government nowhere denies that petitioner is currently imprisoned for committing crimes—at least those alleged in Count 32 of the indictment—without the benefit of any judicial determination that he actually committed those crimes and that the *same* alleged falsehoods were false, material, and made with the requisite criminal intent to defraud. See Pet. 16-17. Indeed, until the Solicitor General filed his brief in this Court, no prosecutor had even ventured to argue that the government's evidence of all of the elements of the indicted fraud crimes, including falsity, materiality, and intent, was overwhelming with respect to a single one of the falsehoods alleged in any count of the indictment. The government makes a half-hearted defense of the decision below despite its bizarre and untenable consequences, but devotes most of its space to attempting to create the impression that the question presented is not ripe for this Court's review. Both efforts fail.

2. The government does not take issue with the principle set forth by this Court's decision in *Yates* and reaffirmed subsequent cases (see Pet. 12-13), that reversal is required when a legal error infects "one ground" for conviction, "but not * * * another, and it is impossible to tell which ground the jury selected." 354 U.S. at 312. The government also does not dispute (i) that each fraud count of the indictment alleged multiple falsehoods, any of which could have served as the ground for the jury's verdict; (ii) that the district court's error (failure to instruct the jury on the materiality element of the alleged crimes) rendered each possible ground for petitioner's fraud convictions legally defective; (iii) that the government's argument below that it

had presented overwhelming evidence of the materiality of some, but not all, of petitioner's alleged falsehoods showed at most that the district court's legal error was harmless with respect to some, but not all, possible grounds for conviction; and (iv) that the other possible grounds for petitioner's convictions remain legally defective "and it is impossible to tell which ground the jury selected." *Ibid.* The government offers no persuasive justification for the unexplained holding below that the *Yates* principle, which would otherwise require reversal here, simply does not apply to harmless-error review. See Pet. App. 13a n.7.

The government emphasizes (at 11) that when this Court in *Yates* rejected the government's argument that the trial court's error there was "harmless" (354 U.S. at 311), *Chapman* had not yet been decided. It is impossible to see the significance of this fact. Since *Chapman*, this Court has reaffirmed the *Yates* principle in *Griffin* and other cases. See Pet. 12-13. The government also suggests (at 11-12) no possible basis for its odd proposed refinement of the Eleventh Circuit's holding, which would apparently exempt from the *Yates* rule only those cases, like this one, where the government tries to show harmless error on the basis of overwhelming evidence, but not cases, like *Yates* or *Keating*, where the government's harmless-error argument rests on some other theory.[1]

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[1] *Keating* thus cannot be distinguished, as the government supposes (at 11 n.4), on the basis of the government's particular theory of harmlessness in that case. The government's choice of harmless-error argument had nothing at all to do with the court's holding: that *Yates* required rejection of the government's harmless-error claim when the government failed to show that the district court's error was harmless with respect to each possible ground for conviction. See 191 F.3d at 1062. As the government concedes (at 11 n.4), the *Keating* court held that the government had failed to show harmlessness "under any of the possible approaches." 191 F.3d at 1064 n.7. The government also cannot

Petitioner does not, of course, dispute that the court below was required to apply this Court's previous decision in *Neder*, and to inquire, following the *Chapman* harmless-error standard, whether the jury's "verdict would have been the same absent the [district court's] error." *Neder*, 527 U.S. at 17. Petitioner, like the government, also perceives no tension between this Court's holding in *Neder* and *Yates*. The question presented is whether the court of appeals correctly held that the *Yates* rule does not apply to harmless-error analysis. The decision below obviously is not, as the government claims (at 12), the first to address this issue. To the contrary, the Eleventh Circuit's decision irreconcilably conflicts with decisions of numerous other courts of appeals, which have agreed that harmless-error review is "guided by" *Yates*. *Hastings*, 134 F.3d at 242; see also, *e.g.*, *Keating*, 191 F.3d at 1062-64; *Perkins*, 161 F.3d at 74-75; *Ienco*, 92 F.3d at 570.

3. The government also attempts, through a series of specious arguments, to dissuade this Court from granting review because, according to the government, even a reversal would be of no consequence. The government's reading (at 9) of the opinion below as holding that the government's evidence of materiality was overwhelming with respect to *every* one of petitioner's alleged falsehoods (aside from those relevant to Count 32) is belied by the court of appeals' own determination that it was not required to make any such finding (see Pet. App. 13a & n.7) and the government's failure even to argue below that it had put on overwhelming

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distinguish (at 12 n.5) *Ienco* on the basis of an interim change in the law that has no bearing on the Seventh Circuit's holding that reversal was required when the government had failed to show that the district court's error was harmless with respect each possible ground for conviction. See 92 F.3d at 570. There can be no serious doubt that both Judge Reinhardt in *Keating* and Chief Judge Posner in *Ienco* would have reached a different outcome from that reached by the Eleventh Circuit in this case.

evidence of the materiality of several entire categories of alleged falsehoods. See Pet. 11 n.2. More fundamentally, however, even if the question presented were only relevant to Count 32—which it is not—that would be no reason for declining to resolve the important and far-reaching issues presented by this case.

The government first proposes (at 9) that petitioner's claims depend on the "highly unlikely premise" that the jury relied on only one of five misrepresentations when it convicted petitioner on Count 32. The government thus would have the Court deny review based on the nonsensical suggestion that the court of appeals, on remand following a decision in petitioner's favor, would ignore the governing *Chapman* standard and would apply a novel harmless-error test, affirming petitioner's conviction on Count 32 with a finding that it is "highly unlikely" that the conviction rests on legally improper grounds.

The government also argues (at 13-14)—for the first time in its brief to this Court—that with respect to three of the five possible theories of conviction for Count 32, the evidence of falsity, materiality, and intent was all overwhelming. This argument, if not waived, would properly be addressed to the court of appeals on remand, not this Court. See *Neder*, 527 U.S. at 19 (remanding to court of appeals for harmless-error determination). And, in any event, the government's argument that its evidence of falsity and intent was overwhelming is implausible in the extreme, squarely contradicting the government's previous concessions that petitioner's primary defense before the jury was that he lacked the intent to defraud, and that petitioner presented extensive supporting evidence to demonstrate, among other things, his good faith reliance on the advice of counsel. See Br. for U.S., No. 97-1985, at 4-5 (petitioner "contest[ed] the falsity of his statements to the lenders, and * * * contend[ed] that he relied in good faith on the advice of his attorney and

lacked an intent to defraud"); Govt. C.A. Supp. Br. 8, 26 (agreeing that petitioner's defenses were "lack of intent to defraud," "lack of falsity," and "good faith reliance on advice of counsel," and noting testimony in petitioner's favor); Govt. C.A. Supp. Reply Br. 4 ("Neder's trial strategy was to show that he lawfully conducted all the affairs of his real estate business in good faith reliance on advice of counsel").[2]

Finally, the government is simply wrong to claim (at 14-15) that a challenge limited to Count 32 is moot because a reversal of that conviction would not, according to the government, change Neder's sentence. In *Carmell* v. *Texas*, 120 S. Ct. 1620, 1626 (2000), for instance, this Court granted review and reversed four of a criminal defendant's fifteen convictions, even though he was already serving life sentences for two of the other convictions, which were uncontested in this Court. Indeed, it is well established that a criminal conviction may be challenged even after the defendant has completed his entire sentence. See *Sibron* v. *New York*, 392 U.S. 40, 53-58 (1968).

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[2] The government's argument evokes Chief Justice Rehnquist's cautionary note in the Court's earlier opinion in this case. Responding to concerns that a defendant could be convicted even if *none* of the necessary elements were found by a jury, the Chief Justice explained, "[h]appily, our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach." 527 U.S. at 17 n.2. But that is exactly what the government hopes to accomplish here. Forced to acknowledge that the district court's error invalidated petitioner's conviction based on one set of facts alleged in Count 32 (that petitioner falsely stated he had made a down payment, see U.S. Br. 5-6), the government proposes that the court of appeals can affirm the conviction by finding overwhelming evidence of *all* of the elements of the crime based on different alleged facts pertaining to a different claimed falsehood.

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO ELIMINATE THE SPLIT AMONG THE CIRCUITS OVER THE MEANING OF MATERIALITY IN THE FEDERAL LAW OF FRAUD.

1. The government's argument regarding whether a victim's participation in an allegedly fraudulent transaction with knowledge that a statement is false is relevant to determining whether the false statement was material fails to address either petitioner's arguments or the existing split among the circuits. Instead of demonstrating that there is no split over the meaning of materiality in federal fraud law, the government mischaracterizes petitioner's arguments and the holding below, attempts to narrow the holding of *Kungys*, and *embraces* the existing split by relying on one test for materiality rather than the definition of materiality that the test is designed to satisfy.

2. Throughout its brief, the government mischaracterizes petitioner's arguments. The very first sentence of the government's argument on this point states (at 15) "[w]ith respect to his convictions on the land development charges, petitioner claims (Pet. 18-26) that the court of appeals erred in concluding that a false statement can be 'material' even though the recipient of the statement knows it is false."[3] But petitioner has never suggested that a false statement *cannot* be material if the victim knows it is false; rather petitioner's argument is that the victim's willingness to take part in the allegedly fraudulent transaction

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[3] The government is also mistaken that petitioner has made this claim only with regard to the "land development fraud" convictions. The court of appeals' error infects all of petitioner's mail, wire, and bank fraud convictions, and consequently the conspiracy, racketeering, and conspiracy to commit racketeering convictions based upon mail, wire, and bank fraud. See Pet. 6; Neder C.A. Supp. Br. 35-37.

with knowledge that the statement is false is *relevant* to determining whether the statement is material. See Pet. 19-22. The court of appeals ruled petitioner's evidence that his alleged victims were aware of the supposed falsity of his statements had no bearing *at all* on the question of materiality. See Pet. App. 15a. It may be easier for the government if petitioner were to make such an absolute argument about victim knowledge, but it is the Eleventh Circuit's ruling, and the government's defense of that ruling, that takes the absolute position.

Viewed with a proper understanding of the government's proposed rule—that a victim's willingness to take part in an allegedly fraudulent transaction after leaning the truth behind a false statement is *irrelevant* to determining whether that statement is material—the arguments and authorities offered by the government in support of that rule are no support at all. Mischaracterizing the question, the government (at 15) cites authority having to do with the effect of "collateral circumstances" and, in a desperate attempt to avoid making a clear statement of the Eleventh Circuit's facially erroneous rule, the government cites cases it claims hold that a victim's knowledge of a statement's falsity "is *usually* not relevant" and "*generally* does not make the statement any less material" (emphasis added). Of course, this weaker formulation of the rule does not accurately reflect what the Eleventh Circuit held below: that a victim's willingness to engage in a transaction even with knowledge of a statement's falsehood can *never* be used to show that the statement is immaterial.

3. The government's attempt (at 16) to limit the *Kungys* standard of materiality (which asks "what would have ensued from * * * knowledge of the misrepresented fact,"*Kungys*, 485 U.S. at 775 (plurality opinion)) to statements "revealing the falsity of an earlier statement" is unavailing. The government offers absolutely no reason,

much less a principled reason, why the materiality standard established in *Kungys* applies only to the particular *form* of the falsehoods made in *Kungys*. This Court has never made such a distinction; indeed, this Court cited the *Kungys* materiality standard *in this case*. *Neder*, 527 U.S. at 16.

Faced with the clear holding of *Kungys*, the government again avoids confronting the issue squarely by mischaracterizing petitioner's argument. The government claims (at 16) that petitioner seeks a standard of materiality that would rely on "hindsight" or a test that would require that a falsehood would "more likely than not" lead a victim to engage in a fraudulent transaction. But petitioner introduced evidence to show that his alleged victims knew the truth underlying his alleged falsehoods *before* they engaged in the transactions at issue. See *infra* 9-10; Pet. 6, 18; Pet. App. 15a, 19a, 21a. The "more likely than not" standard attacked by the government is a straw man; petitioner has never sought such a standard.

4. Unable to deny the split in the courts of appeals on this question, the government *embraces* the split, arguing (at 17) that, because the securities statutes "involve * * * a different theory of harm," "materiality takes on a different meaning" in those statutes than it does in the mail, wire, and bank fraud statutes. The government offers no explanation of what is different about the "theory of harm" addressed by the securities laws, nor can it. Both sets of laws protect against the same type of harm: the making of a material false statement (or a material omission) that induces someone to enter into a fraudulent transaction.

Instead, the government stands *Basic Inc.* v. *Levinson* on its head, co-opting the *Basic* test for materiality in fraud-on-the-market cases—that a statement "significantly altered the 'total mix' of information available," 485 U.S. at 232—for the government's effort to redefine the meaning of materiality in securities fraud cases. But *Basic* does not

establish a separate definition of materiality in securities cases; the *Basic* test is simply a way of applying the concept of materiality to a context in which many of the victims would never have heard the false statement in question. Far from divorcing materiality in securities fraud cases from materiality in other fraud cases, *Basic* simply establishes a presumption—that a statement made to a market instead of an individual affects individuals in the same way as if the statement were made to them personally. See *Basic*, 485 U.S. at 245-49 (cited in *Kungys*, 485 U.S. at 777).

5. Also unavailing is the government's weak attempt to argue away the split among the circuits on this issue. The government pretends that the First Circuit and the Ninth Circuit, which have both come down squarely against the Eleventh Circuit holding in this case (Pet. at 19-20), agree with the Eleventh Circuit's ruling in the context of criminal fraud. But the cases the government cites (at 15, 18) establish no such thing. Neither of the cases addresses the relevance of the fact that an alleged victim entered into a transaction after knowing the statement in question was false. *Goldfine*, a case for which the government reached back almost twenty-five years, involved a conviction under 18 U.S.C. § 1001 for making false statements to customs agents even though the agents knew the underlying truth. The Ninth Circuit found that, even though the statement could not have prompted reliance by the customs agents because they knew the truth, it was still a violation of § 1001. 538 F.2d at 820-21. But, unlike the loan officers and other alleged victims in this case, the customs agents in *Goldfine refused* to participate in the fraudulently induced transaction after they knew the truth. *Goldfine* is completely inapposite because Goldfine, unlike petitioner, did not offer the willing participation of the correctly informed customs agents as evidence that his falsehoods were immaterial. What petitioner attempted to show below, and what the Eleventh Circuit ruled was

irrelevant, was that even after his alleged victims knew the truth behind his allegedly false statements, they were *willing* to enter into the transactions for which he was charged. The government's other case, *Corsino*, does not address victim knowledge at all, much less an alleged victim's willingness to enter into a transaction after learning the truth behind a false statement. See 812 F.2d at 29-31. *Corsino* thus furthers neither the government's argument (at 15) that the Eleventh Circuit ruled correctly nor the government's ineffective attempt (at 18) to argue away the circuit split on this issue. The government failed entirely to address the split between the Eleventh and Fourth Circuits. See Pet. 20.

The government cannot defend the Eleventh Circuit's patently erroneous ruling by attempting to recast the decision, mischaracterizing the petitioner's position as more extreme than it is, and relying on court decisions having nothing to do with victim knowledge in the context of fraud. The court of appeals' ruling is indefensible, and it contributes to an existing circuit split over the meaning of materiality in the federal law of fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL G. LAWRENCE
Law Offices of
Noel G. Lawrence, P.A.
100 Riverside Avenue
Jacksonville, Florida 32202
(904) 733-1237

JAVIER H. RUBINSTEIN
Counsel of Record
KASPAR J. STOFFELMAYR
THOMAS B. NACHBAR
KARNIG KERKONIAN
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

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